

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 STATE OF CALIFORNIA

3 Case No. ADJ1177048 (SFO 0487779)

4 **WANDA OGILVIE,**

5 *Applicant,*

6 vs.

7 **CITY AND COUNTY OF SAN FRANCISCO,**
8 **Permissibly Self-Insured,**

9 *Defendant(s).*

**OPINION AND DECISION
AFTER RECONSIDERATION
(EN BANC)**

10 We granted the petition for reconsideration of defendant, the City and County of San
11 Francisco, to allow time to further study the record and applicable law. Because of the important
12 legal issue as to whether and how the diminished future earning capacity (DFEC) portion of the
13 current Schedule for Rating Permanent Disabilities (Schedule or 2005 Schedule)¹ may be rebutted,
14 and to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a
15 majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc
16 decision. (Lab. Code, § 115.)²

17 For the reasons below, we hold in summary that: (1) the DFEC portion of the 2005
18 Schedule is rebuttable; (2) the DFEC portion of the 2005 Schedule ordinarily is *not* rebutted by
19 establishing the percentage to which an injured employee's future earning capacity has been
20 diminished; (3) the DFEC portion of the 2005 Schedule is *not* rebutted by taking two-thirds of the
21 injured employee's estimated diminished future earnings, and then comparing the resulting sum to
22 the permanent disability money chart to approximate a corresponding permanent disability rating;
23 and (4) the DFEC portion of the 2005 Schedule may be rebutted in a manner consistent with Labor
24 Code section 4660 – including section 4660(b)(2) and the RAND data to which section 4660(b)(2)

25 _____
26 ¹ The complete Schedule may be found at <http://www.dir.ca.gov/dwc/PDR.pdf>.

27 ² En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers' compensation judges. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also Gov. Code, § 11425.60(b).)

1 refers.³ Further, the DFEC rebuttal approach that is consonant with section 4660 and the RAND
2 data to which it refers consists, in essence, of: (1) obtaining two sets of wage data (one for the
3 injured employee and one for similarly situated employees), generally through the Employment
4 Development Department (EDD); (2) doing some simple mathematical calculations with that wage
5 data to determine the injured employee's individualized proportional earnings loss; (3) dividing the
6 employee's whole person impairment by the proportional earnings loss to obtain a ratio; and
7 (4) seeing if the ratio falls within certain ranges of ratios in Table A of the 2005 Schedule. If it
8 does, the determination of the employee's DFEC adjustment factor is simple and relates back to
9 the Schedule. If it does not, then a non-complex formula is used to perform a few additional
10 calculations to determine an individualized DFEC adjustment factor.

11 Here, the workers' compensation administrative law judge (WCJ) did not follow the correct
12 method of determining whether and how the DFEC portion of the 2005 Schedule may be rebutted.
13 Accordingly, we will rescind the WCJ's findings on permanent disability, apportionment, and
14 attorney's fees and remand the matter to the WCJ for further proceedings and a new decision on
15 those issues consistent with our opinion.

16 **I. BACKGROUND**

17 Applicant, Wanda Ogilvie, sustained an admitted industrial injury to her right knee, low
18 back and neck on April 1, 2004, while employed as a transit operator (occupational group 250) by
19 defendant. She was 59 years old at the time of her injury.

20 On September 14, 2004, applicant had a right knee arthroscopy, partial medial
21 meniscectomy, and chondroplasty. On May 8, 2006, she had a right knee replacement. Although a
22 spine surgeon recommended that applicant have a posterior lumbar laminectomy and interbody
23 fusion at L4-L5 and L5-S1, applicant declined to have the surgery. She did not return to work
24 following her April 1, 2004 injury.

25 Applicant selected Dominic Tse, M.D., as her qualified medical evaluator (QME) in
26 orthopedics. In his March 8, 2007 report, Dr. Tse declared applicant to be permanent and

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³ Unless otherwise noted, all further statutory references are to the Labor Code.

1 stationary. With regard to her right knee, Dr. Tse found that she had 20% whole person
2 impairment (WPI) under the AMA Guides, but he further noted that applicant's right knee
3 condition limited her to semi-sedentary work, contemplating the ability to work approximately
4 50% of the time in a sitting position and 50% of the time in a standing or walking position, with a
5 minimum of demand for physical effort while standing, walking or sitting. With respect to
6 applicant's spine, Dr. Tse found 10 to 13% WPI of the lumbar spine (i.e., DRE lumbar category
7 III) and 15 to 18% WPI of the cervical spine (i.e. DRE cervical category III), based on the AMA
8 Guides. He also concluded that applicant's spinal disability precluded substantial work,
9 contemplating the loss of approximately 80% of her pre-injury capacity for performing such
10 activities as bending, stooping, lifting, pushing, pulling, climbing, or other activities involving
11 comparable physical effort. Dr. Tse opined that 80% of the right knee disability was caused by the
12 April 1, 2004 injury, with the remaining 20% caused by other factors. He further opined that 34%
13 of the spinal disability was caused by the injury, with 66% caused by other factors. He concluded
14 that applicant could no longer work as a transit operator.

15 Defendant selected Eugene A. Baciocco, M.D., as its QME in orthopedics. In his February
16 21, 2006 report, Dr. Baciocco found 4% WPI of the right knee and 8% WPI of the lumbar spine
17 (i.e., DRE lumbar category II), resulting in a combined WPI of 10% under the AMA Guides.
18 Following applicant's May 8, 2006 right knee surgery, Dr. Baciocco issued two supplemental
19 reports of August 8, 2006 and April 4, 2007; however, he never provided a post-surgical
20 assessment of her disability under the AMA Guides.

21 On August 20, 2008, applicant's claim went to trial on the issues of permanent disability,
22 apportionment, and attorney's fees. At trial, the parties stipulated that, if applicant's disability was
23 rated in accordance with the 2005 Schedule, it would rate 28% after adjustment for age and
24 occupation and after apportionment – equating to permanent disability indemnity in the total sum
25 of \$26,700.00. This agreed scheduled rating was based on a compromise between the opinions of
26 Drs. Tse and Baciocco, together with a stipulation that 25% of *any* permanent disability in the case
27

1 would be apportionable to non-industrial and pre-existing causes. However, applicant sought to
2 rebut the agreed 28% scheduled rating.

3 At trial, applicant testified that she took a service retirement in 2007 and is on Social
4 Security disability. She believed she would be unable to return to her job as a bus driver. She was
5 not offered modified or alternative employment by defendant.

6 Also, at trial, the parties stipulated that Eugene E. Van de Bittner, Ph.D., and Jeff Malmuth,
7 M.S. – who are both certified rehabilitation counselors – qualified as experts in the fields of
8 vocational rehabilitation and diminished future earnings capacity. The parties further agreed to
9 submit the reports of these experts in lieu of their testimony.

10 Dr. Van de Bittner, who was defendant's expert, concluded in his February 16, 2008 report
11 that, absent her industrial injury, applicant likely would have earned \$335,680.80 during the
12 remaining 6.09 years of her expected work life. Further, based on two different scenarios, Dr. Van
13 de Bittner found that, after sustaining her industrial injury, applicant could likely earn either
14 \$169,391.25 or \$177,654.88 during her remaining expected work life. This is between
15 \$158,025.92 and \$166,289.55 less than her pre-injury earning capacity. Therefore, Dr. Van de
16 Bittner opined that, to a reasonable degree of vocational probability, applicant's diminished future
17 earning capacity ranged from 51.31% to 53.77%.

18 The September 25, 2007 report of applicant's expert, Mr. Malmuth, concluded that
19 applicant's pre-injury earning capacity during the 6.26 years of her estimated remaining work life
20 would be \$364,482.24. He further found that, following the injury, applicant's earning capacity
21 over the same time period would be \$178,562.88, which is \$185,919.36 less than her pre-injury
22 earning capacity. Accordingly, Mr. Malmuth estimated applicant's diminished future earning
23 capacity to be 51%.

24 On September 17, 2008, the WCJ issued a Findings and Award which determined that
25 applicant's April 1, 2004 injury caused permanent disability of 40%, after adjustment for age and
26 occupation and after apportionment. In essence, the WCJ concluded that applicant had rebutted the
27 2005 Schedule because the \$26,700.00 in permanent disability indemnity she would receive if the

1 28% agreed scheduled rating was used would not fairly, adequately and proportionally compensate
2 applicant for her \$158,025.92 to \$178,562.88 in lost future earnings (i.e., her diminished future
3 earning capacity of 51% to 53.77%), as determined by the vocational rehabilitation experts.

4 In arriving at his 40% permanent disability rating, the WCJ took into consideration three
5 alternative rating methods.

6 With respect to the first method, the WCJ observed that the 2005 Schedule states as
7 follows:

8 "A permanent disability rating can range from 0% to 100%. Zero
9 percent signifies no reduction of earning capacity, while 100%
10 represents permanent total disability. A rating between 0% and
11 100% represents permanent partial disability. Permanent total
12 disability represents a level of disability at which an employee has
13 sustained a total loss of earning capacity." (2005 Schedule, at pp.
14 1-2 – 1-3.)

15 The WCJ then said, "A logical inference to be drawn from the foregoing ... is that the percentage
16 of an injured worker's diminished future earning capacity could be the measure of the worker's
17 permanent disability rating. ... For example, ... a 50% loss of earning capacity would justify a
18 50% permanent disability rating." The WCJ further pointed out that Mr. Malmuth found a DFEC
19 of 51%, while Dr. Van de Bittner found a DFEC of 51.31% to 53.77%. Moreover, the WCJ said
20 that in reaching their DFEC opinions, both experts considered applicant's age, occupation, and
21 medical condition. Therefore, the WCJ implicitly found that their opinions take into account all of
22 the elements set forth in the paramount paragraph of section 4660, which provides, "In determining
23 the percentages of permanent disability, account shall be taken of the nature of the physical injury
24 or disfigurement, the occupation of the injured employee, and his or her age at the time of the
25 injury, consideration being given to an employee's diminished future earning capacity." (Lab.
26 Code, § 4660(a).) Accordingly, under his first method, the WCJ concluded that applicant's
27 permanent disability could appropriately rate from 51% to 53%. Therefore, after the stipulated
25% apportionment, her permanent disability could rate from 38% to 40%, warranting a permanent
disability indemnity award of between \$40,350.00 and \$43,150.00.

With respect to the second method, the WCJ stated that applicant's lost future earnings are
\$172,000.00, which is within the range of the \$158,025.92 to \$178,562.88 in lost future earnings

1 found by Mr. Malmuth and Dr. Van de Bittner – who, once again, took into consideration all of the
2 permanent disability elements set forth in section 4660(a). Then, “relying on the premise that
3 injured workers should not be compensated for more than two-thirds of their loss of future
4 earnings” (see Lab. Code, § 4658),⁴ the WCJ determined that applicant’s “compensable” earnings
5 loss is \$114,667.00 (i.e., $\frac{2}{3}$ x \$172,000.00). This approximately equates to the compensation
6 warranted by a 71.5% permanent disability rating. This 71.5% rating, however, must be reduced
7 by the agreed apportionment of 25%, resulting in a 54% rating, warranting a permanent disability
8 award of \$63,600.00. This \$63,600.00 award is \$36,900.00 greater than the \$26,700.00 award
9 which would result from the agreed Scheduled rating of 28%.

10 With respect to the third method, the WCJ said that, under the 2005 Schedule, a permanent
11 disability rating is calculated by multiplying the employee’s WPI by a DFEC adjustment factor,
12 and then further adjusting the resulting rating for age and occupation. Here, applicant’s scheduled
13 DFEC adjustment factors are 1.14 for the knee and 1.27 for the low back; but, the parties did not
14 specify what portion of the agreed 28% scheduled rating was attributable to each body part. The
15 WCJ inferred, however, that applicant’s knee disability was more significant than her spinal
16 disability; accordingly, he found an “average” DFEC adjustment factor of 1.18. This corresponds
17 to an 18% increase in the WPI rating. Nevertheless, the WCJ reiterated that the agreed scheduled
18 rating “does not adequately and fairly compensate applicant for her diminished future earning
19 capacity.” Therefore, he concluded that he must “increas[e] the average DFEC adjustment factor
20 [of 1.18] to a sum sufficient to produce an award more commensurate with applicant’s loss of
21 future earnings.” At this point, the WCJ took the \$114,667.00 “compensable” earnings loss he
22 found under his second method, above, and observed that this figure is 4.29 times higher than the
23 \$26,700.00 award for the agreed scheduled rating. Then, he multiplied the 18% increase in the
24 WPI rating by 4.29, to arrive at an increase in the standard impairment of 77% (i.e., a DFEC
25 adjustment factor of 1.77). The WCJ multiplied the 28% agreed scheduled rating by 1.77, to arrive

26 ⁴ Section 4658 sets the “[n]umber of weeks for which two-thirds of average weekly earnings [are] allowed for
27 each 1% of permanent disability within [each specified] percentage range.” However, section 4453 sets certain
maximums for average weekly earnings; therefore, an employee’s permanent disability payments do not necessarily
correspond to two-thirds of his or her average weekly earnings.

1 at a rating of 49%. Next, however, he stated that because 18% of the increase in the WPI rating
2 was previously accounted for, then this 18% had to be subtracted from the 77%. The WCJ found
3 that this resulted in a 49% [sic] overall increase in the WPI rating (i.e., a DFEC adjustment factor
4 of 1.49).⁵ Accordingly, he multiplied the 28% agreed Scheduled rating by 1.49, to arrive at a new
5 rating of 42%. He said that this 42% rating would not be modified for age, occupation, or
6 apportionment, because the parties already had accounted for these factors when they stipulated to
7 the 28% scheduled rating.

8 Finally, “[g]iving some weight to each of the [three] foregoing methods,” the WCJ
9 concluded that a 40% rating after apportionment “is the most fair and adequate rating in light of the
10 evidence of actual diminished future earnings in this case.”

11 Defendant filed a timely petition for reconsideration, contending in substance that:
12 (1) applicant failed to meet her burden of establishing that the presumptively correct 2005
13 Schedule is arbitrary, capricious or unreasonable; (2) each of the alternative methods the WCJ
14 utilized to assess applicant’s permanent disability has no basis in law and is inconsistent with the
15 intent of section 4660, as amended by Senate Bill 899 (SB 899),⁶ to create uniformity, objectivity,
16 and consistency in permanent disability determinations; and (3) the Minutes of Hearing failed to
17 list a document submitted by defendant at trial.

18 Applicant filed an answer to defendant’s petition.

19 On December 15, 2008, we granted reconsideration.

20 **II. DISCUSSION**

21 The chief issues before us relate to rebutting the DFEC portion of the 2005 Schedule. We
22 will focus almost exclusively on these issues and only briefly address the other issues that
23 defendant raises.

24 **A. A Brief History Of Labor Code Section 4660.**

27 ⁵ The WCJ made a mathematical error, because 77% minus 18% equals 59%, not 49%.

⁶ Stats. 2004, ch. 34, § 32.

1 Beginning when the first mandatory Workers' Compensation Act was enacted in 1917,
2 through the Act's first codification in 1937, and on until 2004, section 4660(a) and its predecessors
3 provided: "In determining the percentages of permanent disability, account shall be taken of the
4 nature of the physical injury or disfigurement, the occupation of the injured employee, and his age
5 at the time of such injury, consideration being given to the diminished ability of such injured
6 employee to compete in an open labor market."⁷ From 1937, when section 4660 first mandated the
7 adoption of a Permanent Disability Schedule, and until 2004, section 4660 set forth no guiding
8 principles regarding the formulation of the Schedule beyond the language of section 4660(a);
9 section 4660, however, did consistently provide that the Schedule constituted "prima facie
10 evidence of the percentage of permanent disability to be attributed to each injury covered by the
11 schedule."

12 In 2004, however, SB 899 substantially amended section 4660.⁸ Section 4660(a) now
13 provides, "In determining the percentages of permanent disability, account shall be taken of the
14 nature of the physical injury or disfigurement, the occupation of the injured employee, and his or
15 her age at the time of the injury, consideration being given to an employee's diminished future
16 earning capacity." Moreover, as pertinent here, new section 4660(b)(2) provides, "For purposes of
17 this section, an employee's diminished future earning capacity shall be a numeric formula based on
18 empirical data and findings that aggregate the average percentage of long-term loss of income
19 resulting from each type of injury for similarly situated employees. The administrative director
20 shall formulate the adjusted rating schedule based on empirical data and findings from the
21 Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December
22 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical
23 studies." Further, amended section 4660(d) provides, "The schedule shall promote consistency,
24 uniformity, and objectivity." However, SB 899 did *not* amend the language of section 4660 which
25 provides that the Schedule "shall be prima facie evidence of the percentage of permanent disability

26 ⁷ Stats. 1917, ch. 586, § 9(b)(7), p. 838; Stats. 1919, ch. 471, § 4, p. 915; Stats. 1925, ch. 354, § 1, p. 642;
27 Stats. 1929, ch. 222, § 1, pp. 422-423; Stats. 1937, ch. 90, § 4660, p. 283; Stats. 1951, ch. 1683, § 1, p. 3880; Stats.
1965, ch. 1513, § 91, p. 3579; Stats. 1993, ch. 121, § 53.

⁸ Stats. 2004, ch. 34, § 32.

1 to be attributed to each injury covered by the schedule.” (Lab. Code, § 4660(c) [formerly,
2 § 4660(b)].)

3 The amendments to section 4660 directed that “[o]n or before January 1, 2005, the
4 administrative director [(AD)] shall adopt regulations to implement the changes made to this
5 section by th[is] act” (Lab. Code, § 4660(e).) Accordingly, by regulation, the AD adopted the
6 new Schedule, which became effective on January 1, 2005. (See Cal. Code Regs., tit. 8, § 9805.)

7 **B. The 2005 Schedule Is Rebuttable.**

8 As discussed in our en banc decisions in *Costa I* (71 Cal.Comp.Cases at p. 1817) and *Costa*
9 *II* (72 Cal.Comp.Cases at p. 1496),⁹ while SB 899 made “sweeping changes” to section 4660, one
10 of the few aspects of section 4660 that SB 899 did not change is that the new Schedule is “prima
11 facie evidence of the percentage of permanent disability.” (Lab. Code, § 4660(c).) This provision
12 has been part of section 4660 since it was first codified in 1937. (Stats. 1937, ch. 90, p. 283; see
13 *Liberty Mutual Ins. Co. v. Industrial Acc. Com. (Serafin)* (1948) 33 Cal.2d 89, 93 [13
14 Cal.Comp.Cases 267, 270] (*Serafin*).) Because the new Schedule is prima facie evidence of an
15 injured employee’s percentage of permanent disability, the Schedule may be rebutted. (*Costa I*, 71
16 Cal.Comp.Cases at pp. 1817-1819; *Costa II*, 72 Cal.Comp.Cases at pp. 1496-1497.)

17 This principle is reflected in a number of cases.

18 For example, in *Universal Studios, Inc. v. Workers’ Comp. Appeals Bd. (Lewis)* (1979) 99
19 Cal.App.3d 647 [44 Cal.Comp.Cases 1133] (*Lewis*), the Court of Appeal stated, in relevant part:

20 “It is no answer ... to say that the ratings schedules ... cannot be
21 questioned. The [cases cited] fully controvert any such ‘hands-off’
22 attitude toward the schedule or the presumptions used to create the
23 schedule ... [¶] ... [T]he rating schedule ... is not absolute,
24 binding and final. ... It is therefore not to be considered all of the
25 evidence on the degree or percentage of disability.” (*Lewis*, 99
26 Cal.App.3d at pp. 657, 658-659, 662-663 [44 Cal.Comp.Cases at
27 pp. 1138, 1139-1140, 1143].)

24 Similarly, in *Glass v. Workers’ Comp. Appeals Bd.* (1980) 105 Cal.App.3d 297, 307 [45
25 Cal.Comp.Cases 441, 449] (*Glass*), the Court of Appeal said: “The Board may not rely upon
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27 ⁹ All references to “*Costa I*” are to *Costa v. Hardy Diagnostics* (2006) 71 Cal.Comp.Cases 1797 (Appeals Board en banc). All references to “*Costa II*” are to *Costa v. Hardy Diagnostics* (2007) 72 Cal.Comp.Cases 1492 (Appeals Board en banc).

1 | alleged limitations in the Rating Schedule to deny the injured worker a permanent disability award
2 | which accurately reflects his true disability. ... While the Rating Schedule is prima facie evidence
3 | of the proper disability rating, it may be controverted and overcome.” (*Glass*, 105 Cal.App.3d at p.
4 | 307 [45 Cal.Comp.Cases at p. 449]; see also *Luchini v. Workmen’s Comp. Appeals Bd.* (1970) 7
5 | Cal.App.3d 141, 146 [35 Cal.Comp.Cases 205, 209] (*Luchini*) (“the board cannot rely on some
6 | administrative procedure [(i.e., the Schedule)] to deny to petitioner a disability award
7 | commensurate with the disability that he has suffered.”).)

8 | Therefore, even though the standards for rating permanent disability under the 2005
9 | Schedule have changed, the 2005 Schedule still is prima facie evidence of an injured employee’s
10 | disability; therefore, a party may present evidence to overcome it. (See Lab. Code, §§ 3202.5,
11 | 5705.) In this regard, our Supreme Court said long ago, “prima facie evidence is that which
12 | suffices for the proof of a particular fact, until contradicted and overcome by other evidence. It
13 | may, however, be contradicted, and other evidence is always admissible for that purpose.” (*Vaca*
14 | *Valley & Clear Lake Railroad v. Mansfield* (1890) 84 Cal. 560, 566 (*Mansfield*); accord: *In re*
15 | *Raymond G.* (1991) 230 Cal.App.3d 964, 972 (*Raymond G.*); see also, Evid. Code, § 602 (“A
16 | statute providing that a fact or group of facts is prima facie evidence of another fact establishes a
17 | rebuttable presumption.”).)

18 | **C. The DFEC Portion Of The 2005 Schedule Is Rebuttable**

19 | In accordance with the discussion above, we specifically conclude that the DFEC portion of
20 | the 2005 Schedule is rebuttable. Nothing in section 4660 suggests otherwise.

21 | Most importantly, section 4660(c) still provides that the Schedule is “prima facie evidence
22 | of the percentage of permanent disability to be attributed to each injury covered by the schedule.”
23 | Because section 4660(c) still declares that the Schedule is rebuttable, then no portion of
24 | it – including the DFEC portion – is conclusive. Any contrary interpretation would nullify, at least
25 | in part, the language of section 4660(c). Moreover, had the Legislature intended that the DFEC
26 | portion of the Schedule be unrebuttable, it could have expressly so stated. It did not.

1 We are aware that when SB 899 amended section 4660, the Legislature provided that “[t]he
2 schedule shall promote consistency, uniformity, and objectivity.” (Lab. Code, § 4660(d).)
3 Nevertheless, we do not believe that in enacting this provision the Legislature intended to preclude
4 an injured employee – or an employer – from rebutting the DFEC portion of the 2005 Schedule.
5 When the Legislature enacts or amends a statute, it is presumed it is “aware of judicial decisions
6 already in existence, and to have enacted or amended [the] statute in light thereof.” (*People v.*
7 *Giordano* (2007) 42 Cal.4th 644, 659 [internal citations and quotation marks omitted]; see also
8 *Fuentes v. Workers’ Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42, 45]
9 (*Fuentes*.) Similarly, when the Legislature enacts or amends a statute, it is presumed that the
10 Legislature does not intend to overthrow long-established principles of law unless such intention is
11 clearly expressed or necessarily implied. (*Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th
12 1313, 1325 [72 Cal.Comp.Cases 565, 574] (*Brodie*); *Fuentes*, 16 Cal.3d at p. 7 [41
13 Cal.Comp.Cases at p. 45].) Therefore, when the Legislature amended section 4660 to provide that
14 the Schedule “shall promote consistency, uniformity, and objectivity” (Lab. Code, § 4660(d)), but
15 at the same time did not alter the provision first enacted in 1939 that the Schedule is “prima facie
16 evidence” (Lab. Code, § 4660(c)), we must assume the Legislature was aware of the long-
17 established case law that an injured employee can rebut the Schedule by showing that his or her
18 disability is actually higher than what the Schedule would provide (e.g., *Glass*, 105 Cal.App.3d at
19 p. 307 [45 Cal.Comp.Cases at p. 449]) and, conversely, that a defendant can rebut the Schedule by
20 showing that the employee’s disability is actually lower (e.g., *Lewis*, 99 Cal.App.3d at pp. 657,
21 658-659, 662-663 [44 Cal.Comp.Cases at pp. 1138, 1139-1140, 1143]).

22 Accordingly, we specifically conclude that the DFEC portion of the 2005 Schedule is
23 rebuttable and not conclusive.

24 ///

25 **D. The DFEC Portion Of The 2005 Schedule Ordinarily Is Not Rebutted By Establishing**
26 **The Percentage To Which An Injured Employee’s Future Earning Capacity Has Been**
Diminished Because, At Least In Most Cases, The Employee’s DFEC Percentage Is Not
Tantamount To His Or Her Percentage Of Permanent Disability.

27 As discussed above, in determining that the DFEC portion of the Schedule had been

1 rebutted in this case, the WCJ utilized three different methodologies. Because two of these
2 methods have some appeal, we will specifically address them now, beginning with his first
3 method.

4 Under his first method, the WCJ equated applicant's permanent disability percentage to her
5 DFEC percentage, as found by the vocational rehabilitation experts. The WCJ believed that this
6 method was justified for two reasons.

7 First, he stated that, in arriving at their DFEC percentages, the vocational rehabilitation
8 experts took into consideration the nature of applicant's injury, her occupation, and her age.
9 Therefore, the WCJ implicitly concluded that basing the permanent disability rating on the
10 vocational rehabilitation experts' opinions of applicant's DFEC percentage would be consistent
11 with section 4660(a), which provides: "In determining the percentages of permanent disability,
12 account shall be taken of the nature of the physical injury or disfigurement, the occupation of the
13 injured employee, and his or her age at the time of injury, consideration being given to an
14 employee's diminished future earning capacity."

15 Second, the WCJ believed that equating applicant's permanent disability rating to her
16 DFEC percentage would be consistent with the language of the 2005 Schedule itself, which states:

17 "A permanent disability rating can range from 0% to 100%. Zero
18 percent signifies no reduction of earning capacity, while 100%
19 represents permanent total disability. A rating between 0% and
20 100% represents permanent partial disability. Permanent total
disability represents a level of disability at which an employee has
sustained a total loss of earning capacity." (2005 Schedule, at pp.
1-2 – 1-3.)

21 In essence, the WCJ concluded that because the 2005 Schedule indicates that 0% permanent
22 disability equates to no reduction of earning capacity and that 100% permanent disability equates
23 to total loss of earning capacity, then a 10% loss of earning capacity equates to a 10% permanent
24 disability rating, a 20% loss of earning capacity equates to a 20% permanent disability rating, etc.

25 Although there are degrees of both logic and simplicity to this approach that are appealing,
26 it has some inherent problems.

1 The fundamental difficulty with this approach is that, if the Legislature had intended that an
2 injured employee's permanent disability percentage could be the same as a vocational
3 rehabilitation expert's opinion of the employee's DFEC percentage, then why did the Legislature
4 not say so? Indeed, why would the Legislature even require a Schedule at all? A Schedule would
5 not be needed to determine a percentage of permanent disability if that percentage could simply be
6 established by the DFEC opinion of a vocational rehabilitation expert who, in reaching his or her
7 DFEC opinion, took into consideration the employee's age and occupation and the nature of the
8 employee's physical injury or disfigurement.

9 Also, the approach is not consonant with the language of section 4660.

10 First, the Legislature did not leave "diminished future earning capacity" undefined.
11 Instead, in the first sentence of section 4660(b)(2), the Legislature specifically defined "diminished
12 future earning capacity" to mean "a numeric formula based on empirical data and findings that
13 aggregate the average percentage of long-term loss of income resulting from each type of injury for
14 similarly situated employees." Then, in the second sentence of section 4660(b)(2), the Legislature
15 went on to indicate that the "empirical data and findings" to which the first sentence refers comes
16 from "the Evaluation of California's Permanent Disability Rating Schedule, Interim Report
17 (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional
18 empirical studies." As we will discuss more extensively in section II-F, below, the 2003 RAND
19 Study (and the companion 2004 RAND Study) used empirical wage data from the Employment
20 Development Department (EDD) to compare the post-injury earnings of injured employees who
21 had permanent disability ratings to the earnings during the same period of similarly situated
22 employees who did not have permanent disability ratings.

23 Arguably, a vocational rehabilitation expert's DFEC percentage is based on a "numeric
24 formula" in the generic sense of $a \div b = c$. That is, the DFEC percentage results from dividing the
25 amount the injured employee likely will earn over his or her remaining expected work life, after
26 the injury, by the amount the injured employee likely would have earned over his or her remaining
27 expected work life, absent the injury. Nevertheless, a vocational rehabilitation expert's DFEC

1 percentage is not a “numeric formula” within the meaning of section 4660(b)(2). This is because it
2 is not based on aggregate empirical wage data, from EDD or another source, that compares the
3 post-injury earnings of an injured employee to the earnings of similarly situated employees.

4 Second, the Legislature declared its general intention that SB 899 would “provide relief to
5 the state from the effects of the current workers’ compensation crisis.” (Stats. 2004, ch. 34, § 49.)
6 As the appellate courts have repeatedly made clear, this statement means that SB 899 was intended
7 to reduce the costs of the workers’ compensation system.¹⁰ Furthermore, the Legislature declared
8 its specific intention that “[t]he [permanent disability] schedule shall promote consistency,
9 uniformity, and objectivity.” (Lab. Code, § 4660(d).)

10 It seems likely that neither of the Legislature’s intentions would be served if the DFEC
11 opinions of vocational rehabilitation experts are the primary basis for determining an employee’s
12 permanent disability. That is, if parties routinely use dueling vocational experts, or even one
13 agreed vocational expert, then the costs of administering the workers’ compensation system may
14 well increase. This would defeat the Legislature’s intention to reduce costs. Also, if the
15 assessment of an injured employee’s permanent disability was largely based on vocational experts’
16 opinions on DFEC (which, by experience, can vary much more widely than the vocational expert
17 opinions here), then the employee’s permanent disability rating would largely be determined by
18 which expert the trier-of-fact accepted. This would defeat the Legislature’s intention to “promote
19 consistency, uniformity, and objectivity” in permanent disability determinations.

20 Accordingly, we conclude that, in the usual case, there is not a one-to-one correlation
21 between an injured employee’s diminished future earning capacity and his or her disability.¹¹

22 **E. The DFEC Portion Of The 2005 Schedule Is Not Rebutted By Taking Two-Thirds Of The**

23 ¹⁰ See *Brodie*, 40 Cal.4th at p. 1329 [72 Cal.Comp.Cases at p. 578] (SB 899 was adopted as “an urgency
24 measure designed to alleviate a perceived crisis in skyrocketing workers’ compensation costs”); *Facundo-Guerrero*
25 *v. Workers’ Comp. Appeals Bd.* (2008) 163 Cal.App.4th 640, 655 [73 Cal.Comp.Cases 785, 796] (SB 899
26 represented “a major reform of the state’s workers’ compensation system, a system perceived to be in dire financial
27 straits at the time”); *Costco Wholesale Corp. v. Workers’ Comp. Appeals Bd. (Chavez)* (2007) 151 Cal.App.4th 148,
155 [72 Cal.Comp.Cases 582, 587 (“the workers’ compensation ... reforms [of SB 899] were enacted as urgency
legislation to drastically reduce the cost of workers’ compensation insurance”).

¹¹ We recognize, however, that there may be some circumstances where an injured employee’s DFEC might be
the sole or dominant factor in determining permanent disability, such as where the employee’s injury causes a total
loss of earning capacity or something approaching a total loss of earning capacity (see, Lab. Code, § 4662). This
question, though, is not before us now.

1 **Injured Employee's Estimated Diminished Future Earnings, And Then Comparing The**
2 **Resulting Sum To The Permanent Disability Money Chart To Approximate A**
3 **Corresponding Permanent Disability Rating.**

4 Under his second method for determining that the DFEC portion of the 2005 Schedule had
5 been rebutted, the WCJ estimated that, as result of her injury, applicant's earning capacity has been
6 diminished by \$172,000.00 over her remaining work life. This \$172,000.00 figure is within the
7 \$158,025.92 to \$178,562.88 range of diminished future earnings found, respectively, by Mr.
8 Malmuth and Dr. Van de Bittner. Then, "relying on the premise that injured workers should not be
9 compensated for more than two-thirds of their loss of future earnings," the WCJ determined that
10 applicant's "compensable" earnings loss is \$114,667.00 (i.e., $\frac{2}{3}$ x \$172,000.00). This figure is
11 roughly the amount of the indemnity that would be payable if applicant had permanent disability of
12 71.5%. (See Lab. Code, § 4658.) Then, taking applicant's overall permanent disability to be
13 71.5%, the WCJ reduced her permanent disability rating to 54%, based on the parties' agreement
14 that 25% of her disability was caused by non-industrial factors.

15 This second method of rebutting the DFEC portion of the 2005 Schedule suffers from some
16 of the same defects as the WCJ's first method. That is, it fails to take into account that the
17 Legislature specifically defined "diminished future earning capacity" to mean "a numeric formula
18 based on empirical data and findings that aggregate the average percentage of long-term loss of
19 income resulting from each type of injury for similarly situated employees." (Lab. Code,
20 § 4660(b)(2).) Also, because it still relies heavily on the opinions of vocational rehabilitation
21 experts, it will neither promote reduced costs (see Stats. 2004, ch. 34, § 49) nor "promote
22 consistency, uniformity, and objectivity" in the determinations of permanent disability (see Lab.
23 Code, § 4660(d)).

24 In addition to these defects, however, there are at least two additional problems.

25 First, if the Legislature had intended California to be a "wage loss" state for permanent
26 disability indemnity, it would have said so. Instead, the Labor Code declares, "In determining the
27 percentages of permanent disability, account shall be taken of the nature of the physical injury or
disfigurement, the occupation of the injured employee, and his or her age at the time of injury,

1 consideration being given to an employee’s diminished future earning capacity.” (Lab. Code,
2 § 4660(a).) Accordingly, in California, an injured employee may be found to have permanent
3 disability even if his or her injury does not cause any actual wage loss. Indeed, if the WCJ’s
4 proposed method of rebutting the 2005 Schedule were to be followed, then two injured employees
5 having the same impairment under the AMA Guides could have radically different permanent
6 disability ratings if, in one case, the employee rebuts the Schedule by showing very significant lost
7 future earnings while, in another case, the defendant rebuts the Schedule by establishing that the
8 employee returned to work at full wages.

9 Second, there is a logical flaw in the WCJ’s analysis because a given permanent disability
10 percentage does *not* necessarily equate to a particular amount of permanent disability indemnity.
11 For example, here, the WCJ concluded that applicant’s April 1, 2004 injury caused “compensable”
12 earnings loss of \$114,667.00, which the WCJ equated to a 71.5% unapportioned permanent
13 disability rating. However, this approach avails only for injured employees who are “maximum”
14 wage earners. That is, for an employee with an April 2004 date of injury who had average weekly
15 earnings of at least \$375.00 per week (Lab. Code, § 4453(b)(7)(E)), then a 71.5% rating would
16 result in indemnity totaling \$114,937.50, i.e., 459.75 weeks of indemnity at \$250.00 per week (i.e.,
17 two-thirds of \$375.00 per week). (Lab. Code, § 4658(c).) If, however, the employee was a
18 “minimum” wage earner, i.e., having average weekly earnings of \$157.50 per week or less (Lab.
19 Code, § 4453(b)(7)(E)), then a 71.5% rating would result in indemnity totaling only \$48,273.75,
20 i.e., 459.75 weeks of indemnity at \$105.00 per week (i.e., two thirds of \$157.50 per week). (Lab.
21 Code, § 4658(c).) Accordingly, a permanent disability rating cannot be based, directly or
22 indirectly, on how closely the amount of an injured employee’s lost earnings correspond to the
23 permanent disability indemnity on a money chart.

24 Having rejected the WCJ’s proposed methods for rebutting the DFEC portion of the 2005
25 Schedule, we now address the proper method for such a rebuttal.

26 **F. In The Usual Case, The DFEC Portion Of The 2005 Schedule May Be Rebutted In A**
27 **Manner Consistent With Section 4660 – Including Section 4660(b)(2) And The RAND Data**
To Which Section 4660(b)(2) Refers.

1 **1. The Language Of Section 4660 And The History Of The DFEC Portion Of The Schedule.**

2 In order to understand how the DFEC portion of the 2005 Schedule may properly be
3 rebutted, it is first necessary to examine the language of section 4660 and the history of the DFEC
4 portion of the Schedule.

5 Section 4660, as amended by SB 899, directed the Administrative Director to adopt a new
6 permanent disability Schedule on or before January 1, 2005. (Lab. Code, § 4660(e), (b)(2), (c).) In
7 relevant part, section 4660(b)(2) provides:

8 “For purposes of this section, an employee’s diminished future
9 earning capacity shall be a numeric formula based on empirical
10 data and findings that aggregate the average percentage of long-
11 term loss of income resulting from each type of injury for similarly
12 situated employees. The administrative director shall formulate the
adjusted rating schedule based on empirical data and findings from
the Evaluation of California’s Permanent Disability Rating
Schedule, Interim Report (December 2003), prepared by the
RAND Institute for Civil Justice, and upon data from additional
empirical studies.”

13 Based on this statutory directive, the DFEC portion of the 2005 Schedule was
14 predicated both on empirical data from the 2003 RAND Study, as specifically referenced in section

15 ///

16 ///

17 ///

18 ///

19 4660(b)(2), and on the 2004 RAND Study’s refinement of that empirical data.¹² (See 2005
20 Schedule, at pp. 1-5 – 1-6.)

21 _____
22 ¹² The “2003 RAND Study” refers to Reville, Robert T., et. al., “Evaluation of California’s Permanent
23 Disability Rating Schedule – Interim Report,” RAND Institute for Civil Justice (December 2003). The “2004 RAND
Study” refers to Seabury, Seth A., et. al., “Data for Adjusting Disability Ratings to Reflect Diminished Future
Earnings and Capacity in Compliance with SB 899,” RAND Institute for Civil Justice (December 2004).

24 Although neither the 2003 RAND Study nor the 2004 RAND Study is in evidence, we deem it appropriate to
25 consider them. For one, section 4660(b)(2) expressly required the Administrative Director to consider the 2003
26 RAND Study in formulating the new Schedule. Moreover, the new Schedule specifically indicates that its FEC Rank
and DFEC adjustment factor provisions were derived from the 2003 and 2004 RAND Studies (see 2005 Schedule, at
27 pp. 1-5 & 1-6) and section 4660 specifically indicates that the provisions of the Schedule may be considered by the
WCAB “without formal introduction in evidence.” (Lab. Code, § 4660(c).) Further, mandatory judicial notice must be
taken of California administrative regulations (Evid. Code, § 451(b)) and discretionary judicial notice may be taken of
official acts and records of the California executive branch (Evid. Code, § 452(c)). Of course, the new Schedule was
adopted by regulation (Cal. Code Regs., tit. 8, § 9805) and the Administrative Director’s rule-making record (see Gov.
Code, § 11347.3) specifically states that she “relied upon” the 2003 and 2004 RAND Studies. (See
http://www.dir.ca.gov/dwc/dwcpropregs/PDRS_ISOR.doc, at p. 2 [Initial Statement of Reasons].) Finally,

1 The 2003 RAND Study addressed several issues. As relevant here, however, it determined
2 the ratio of the average permanent disability ratings to the average proportional earnings losses for
3 a large number of employees who suffered industrial injuries to various body parts. (2003 RAND
4 Study, at pp. 18-31.)

5 Specifically, the 2003 RAND Study began with 241,685 employees who had sustained
6 industrial injuries between January 1, 1991 and April 1, 1997 and who had received formal
7 permanent disability ratings from the Disability Evaluation Unit of the Division of Workers'
8 Compensation (DEU). (*Id.*, at p. 18.) Then, using wages paid data from EDD, the 2003 RAND
9 Study determined the actual post-injury earnings of each of these injured employees. (*Id.*)

10 Next, again using EDD wage data, the 2003 Study compared the post-injury earnings of
11 each of these 241,685 injured employees to the earnings during the same period of "a control group
12 of workers at the same firm with similar pre-injury earnings" who had *not* sustained industrial
13 injuries resulting in formal permanent disability ratings. (*Id.*, at p. 19.) The control group's
14 earnings "represent[ed] what [each] injured worker would have received if he or she had never
15 been injured." (*Id.*) The earnings of each injured employee and the earnings of his or her
16 corresponding control group were compared for a three-year period following the particular
17 employee's date of injury. (*Id.*, at pp. 21, 23.) The difference between the earnings of each injured
18 employee and the earnings of his or her corresponding control group in this three-year post-injury
19 period constituted the estimated earnings loss of each injured employee. (*Id.*, at p. 19.)

20 Next, each injured employee's estimated earnings loss was divided by the earnings of the
21 employee's corresponding control group, in order to obtain an estimate of his or her proportional
22 earnings loss. (*Id.*) Thereafter, the 241,685 employees were separated into 27 groups based on
23 their types of impairments (i.e., injured body parts). (*Id.*, at p. 28.) Then the permanent disability
24 rating for each employee within a particular group (e.g., all employees having knee impairments)

25 discretionary judicial notice may be taken of facts and propositions that are not reasonably subject to
26 dispute and are capable of immediate and accurate determination by resort to sources of reasonably
27 indisputable accuracy (Evid. Code, § 452(h)). The RAND Studies are capable of immediate and
accurate determination by resort to sources of reasonably indisputable accuracy, i.e., RAND's own website. (See
http://www.rand.org/pubs/working_papers/2004/RAND_WR214.pdf (2004 RAND Study.) and
http://www.rand.org/pubs/docuemented_briefings/DB443/DB443.pdf (2003 RAND Study))

1 was divided by his or her estimated proportional earnings loss; at which point, the individual
2 ratings to proportional earnings loss ratios of each injured employee within each impairment group
3 were combined to determine an average permanent disability rating over average proportional
4 earnings loss ratio for that impairment group. (*Id.*, at pp. 28-31.)

5 These ratios of average ratings to average proportional earnings losses varied significantly,
6 depending on the particular impairment involved. For example, the average ratio of ratings to
7 proportional earnings loss for knee injuries was 1.77, but for psychiatric injuries it was 0.58. (*Id.*,
8 at pp. 28, 30.) This means that, under the Permanent Disability Schedules in effect from 1991
9 through 1997 (i.e., the period that was the subject of the RAND Studies), knee injuries received
10 higher permanent disability benefits than did psychiatric injuries of similar severity. (*Id.*, at p. 28.)

11 The 2004 RAND Study (which issued after the April 19, 2004 effective date of section
12 4660) further refined these ratings to proportional wage loss ratio data, with the intent that the
13 revised data could be used to compute the DFEC adjustment factors for the new Schedule, as
14 required by SB 899. (See 2004 RAND Study, at pp. 2, 14, 15.) The 2004 RAND Study used the
15 same DEU and EDD data as the 2003 RAND Study (*id.*, at p. 2), however, there are three chief
16 differences between the 2003 Study and the 2004 Study. First, the former used *final* permanent
17 disability ratings for the ratios, but the latter used *standard* permanent disability ratings. (*Id.*, at p.
18 2.) The 2004 Study explained, “given that the age and occupation adjustments are still going to be
19 used in the new schedule, it seemed that the initial *standard rating*, is a more appropriate tool with
20 which to calculate the diminished future earnings capacity adjustments.” (*Id.* (emphasis in
21 original).) Second, the 2004 Study made some statistical modifications to the proportional
22 earnings loss data by dropping out the top and bottom percentiles to eliminate the undue effect of
23 “extreme” cases (e.g., cases where the injured employee’s post-injury earnings substantially
24 exceeded the control group’s earnings, such as where the control group’s earnings were quite low
25 or even zero). (*Id.*, at pp. 3-7.) Third, the 2004 Study separated spinal impairments into three
26 different regions, i.e., lumbar, cervical, and thoracic. (*Id.*, at pp. 8-9.) The results of the 2004
27 RAND Study were that, for 22 specific impairment categories (including three spinal region

1 categories) and one “other” category (for miscellaneous injuries), the average ratios of standard
2 ratings over proportional earnings losses ranged from 0.45 (for psychiatric impairments) to 1.81
3 (both for hand/finger impairments and for vision impairments), with all of the ratios being set out
4 in Table 5 of the Study. (*Id.*, at pp. 12-13.)

5 The 2005 Schedule adopted the average standard ratings to average proportional earnings
6 losses ratios for various impairments from Table 5 of the 2004 RAND Study and, except for some
7 slight differences, incorporated these ratios into Table B of the Schedule. (2005 Schedule, at pp. 1-
8 6 [Paragraph (a)-1], 1-7 [Table B], 1-8.)¹³ Next, the 2005 Schedule consolidated these 22 average
9 ratings to proportional earnings loss ratios into eight FEC Ranks. (2005 Schedule, at pp. 1-6
10 [Paragraph (a)-2], 1-7 [Table B].) For example, FEC Rank One included impairments that had
11 average ratings to proportional earnings loss ratios within the range of 1.647 to 1.810, while FEC
12 Rank Eight included impairments that had average ratios within the range of 0.450 to 0.620. (2005
13 Schedule, at p. 1-7 [Tables A & B].) Then, the Schedule established a series of eight DFEC
14 adjustment factors corresponding to each FEC Rank. (2005 Schedule, at pp. 1-6 [Paragraph (a)-3],
15 1-7 [Table A].) The minimum DFEC adjustment factor is 1.100000 for FEC Rank One and the
16 maximum DFEC adjustment factor is 1.400000 for FEC Rank Eight. (*Id.*)¹⁴ These minimum and
17 maximum DFEC adjustment factors established by the Schedule were calculated by using the
18 numeric formula $([1.81/a] \times .1) + 1$, where “a” corresponds to both the minimum and the
19 maximum ratings to wage loss ratios from Table B of the Schedule. (2005 Schedule, at p. 1-6
20 [Paragraph (a)-4].)¹⁵

21
22 ¹³ There are 22 categories of body parts listed in Table B, including an “other” category, which covers 14
miscellaneous categories of injuries. (2005 Schedule, at p. 1-8.) The 2004 RAND Study, however, had 23 categories,
including an “other” category. (2004 RAND Study, at p. 13 [Table 5].) The RAND category for “headaches” was not
included in the 2005 Schedule.

23 ¹⁴ These adjustment factors came from a policy decision made by the Administrative Director. (See *Costa I,*
supra, 71 Cal.Comp.Cases at p. 1816; *Boughner v. Comp USA, Inc.* (2008) 73 Cal.Comp.Cases 854, 867-868
24 (Appeals Board en banc).) It appears that the 1.81 in the formula is derived from the 1.810 rating to proportional
earnings loss ratios for hand/finger impairments and for vision impairments, which are the highest such ratios in the
25 Schedule. (See 2005 Schedule, at p. 1-7, Table B.)

26 ¹⁵ Thus, the minimum DFEC adjustment factor of 1.100000 was calculated by using the highest ratio for any of
the impairments in the RAND Studies – i.e., 1.810 (which was the rating/wage loss ratio for both hands/fingers
impairments and vision impairments) – and then plugging this 1.810 ratio into the formula – i.e., $([1.81/1.810] \times .1) +$
27 $1 = 1.100000$. The maximum DFEC adjustment factor of 1.400000 was calculated by using the lowest ratio for any of
the impairments in the RAND Studies – i.e., 0.450 (which was the rating/wage loss ratio for the psyche) – and then
plugging this 0.450 ratio into the formula – i.e., $([1.81/0.450] \times .1) + 1 = 1.402222$, which was rounded to 1.400000.

1 Under the 2005 Schedule, the eight DFEC adjustment factors are used to multiply the
2 injured employee's standard whole person impairment rating under the AMA Guides. (2005
3 Schedule, at pp. 1-6 – 1-7 [Paragraph (a)-4].) For example, the minimum 1.100000 adjustment
4 factor results in a 10% increase in the WPI rating and the maximum 1.400000 adjustment factor
5 results in a 40% increase. (2005 Schedule, at p. 1-6 [Paragraph (a)-3].)

6 **2. Consistent With Section 4660(b)(2) And The RAND Study Data To Which It Refers, The**
7 **First Step In Determining Whether The DFEC Portion Of The 2005 Schedule Has Been**
8 **Rebutted Is To Establish The Injured Employee's Individualized Proportional Earnings**
9 **Loss.**

10 Once again, section 4660(b)(2) provides that “[f]or purposes of this section, an employee’s
11 diminished future earning capacity shall be a numeric formula based on empirical data and findings
12 that aggregate the average percentage of long-term loss of income resulting from each type of
13 injury for similarly situated employees.” Section 4660(b)(2) further provides that “the
14 administrative director shall formulate the adjusted rating schedule based on empirical data and
15 findings from the [2003 RAND Study] and upon data from additional empirical studies.”

16 As discussed in greater detail above, the Administrative Director utilized the aggregate
17 empirical data and findings from both the 2003 and 2004 RAND Studies in formulating the DFEC
18 portion of the 2005 Schedule. In reaching their findings, the 2003 and 2004 RAND Studies began
19 by determining – for each of the 241,685 injured employees in the study – what their actual
20 earnings were (if any) in the three years following their respective injuries, based on each
21 employee’s post-injury EDD earnings data. (See 2003 RAND Study, at pp. 18, 21, 23; 2004
22 RAND Study, at pp. 2, 3, 12.) Next, the 2003 and 2004 RAND Studies determined what each
23 individual employee in the study likely would have earned, absent the industrial injury, by
24 examining EDD data on what uninjured workers at the “same firm” in similar jobs (i.e., the control
25 group) actually earned during the same period. (See 2003 RAND Study, at p. 19; 2004 RAND
26 Study, at p. 3.) Then, the 2003 and 2004 RAND Studies took the difference between the earnings
27 of each injured employee and the earnings of his or her corresponding control group as being the
estimated earnings loss of each injured employee for the three-year post-injury period. (*Id.*)
Finally, as relevant to this portion of our discussion, each injured employee’s estimated earnings

1 loss was divided by the actual earnings of his or her corresponding control group, in order to obtain
2 an estimate of his or her proportional earnings loss during this three-year period. (See 2003 RAND
3 Study, at p. 19; 2004 RAND Study, at pp. ii, 3-4.)

4 Consistent with section 4660(b)(2) and the 2003 and 2004 RAND Studies, when a party
5 seeks to rebut the DFEC portion of the Schedule in a particular case, the starting point will be to
6 establish the employee's individualized proportional earnings loss. This is done in four steps.

7 **a. Determining The Injured Employee's Post-Injury Earnings**

8 In determining an individual employee's proportional earnings loss, the first step ordinarily
9 will be to establish the employee's actual earnings in the three years following his or her injury (as
10 did the RAND Studies), using the employee's EDD wage data or other empirical wage
11 information. Generally, this will be accomplished by having the employee obtain his or her wage
12 information from EDD (Unemp. Ins. Code, § 1094(e)), either voluntarily or through an order
13 compelling. However, other empirical earnings information also may be used, including earnings
14 records from the Social Security Administration. (42 U.S.C. §§ 405(c)(3), 1306; 20 C.F.R.
15 §§ 401.100(a), 404.810(a); 5 U.S.C. § 552a(b); see also, *Jimenez v. San Joaquin Valley Labor*
16 *(2002) 67 Cal.Comp.Cases 74, 84 (Appeals Board en banc) (Jimenez); Garber v. Worker's Comp.*
17 *Appeals Bd. (1999) 64 Cal.Comp.Cases 248 (writ den.).*) Moreover, while federal and state tax
18 records, including W-2 forms, are privileged (*Schnabel v. Superior Court (1993) 5 Cal.4th 704,*
19 *718-723 (Schnabel); Ameri-Medical Corp. v. Workers' Comp. Appeals Bd. (Rhooms) (1996) 42*
20 *Cal.App.4th 1260, 1289 [61 Cal. Comp. Cases 149, 170] (Rhooms)), "[t]he privilege is not*
21 *absolute"* and does not apply where a stronger public policy controls or when a party has waived
22 the privilege. (*Schnabel, 5 Cal.4th at p. 718; Weingarten v. Superior Court (2002) 102 Cal.App.4th*
23 *268, 274; Jimenez, 67 Cal.Comp.Cases at p. 84.*)

24 Yet, although the 2003 and 2004 RAND Studies used three years of post-injury earnings as
25 the basis for their proportional earnings loss calculations, there is nothing magical about a three-
26 year period. This is because the 2003 and 2004 RAND Studies used three-year proportional
27 earnings losses only "because these data provide the best balance between representing long-term

1 outcomes and a sufficient number of observations with which to conduct [an] analysis” for a large-
2 scale study. (See 2004 RAND Study, at p. 3.) In cases of individual injured employees, however, a
3 longer or shorter period of post-injury earnings may be appropriate. For example, if an employee’s
4 injury results in a long period of temporary disability, then it might be appropriate to use a longer
5 period than three years – or a three-year period with a starting date later than the date of injury,
6 such as the injured employee’s permanent and stationary date – for assessing the injured
7 employee’s “long-term loss of income.” (Lab. Code, § 4660(b)(2).) As another example, where an
8 injured employee becomes permanent and stationary (i.e., reaches maximum medical
9 improvement) shortly after the date of his or her industrial injury, then an attempt to rebut the
10 DFEC portion of the 2005 Schedule need not be delayed until three years of post-injury wage data
11 becomes available. In such a case, it might be appropriate to use a shorter period of wage data or
12 to make projections that *estimate* three years of post-injury earnings.¹⁶

13 **b. Determining The Post-Injury Earnings Of Similarly Situated Employees.**

14 Once the injured employee’s actual or estimated post-injury earnings for three years (or
15 another appropriate period) have been determined, then, consistent with section 4660(b)(2) and the
16 2003 and 2004 RAND Studies, the second step is to examine EDD wage data or other empirical
17 wage information to establish what “similarly situated employees” earned during the same three-
18 year (or other) period.

19 Of course, in the RAND Studies these “similarly situated employees” were “a control
20 group of workers at the same firm with similar pre-injury earnings” to the injured employee (see
21 2003 RAND Study, at p. 19), i.e., “uninjured workers [at the same firm] who appeared to
22 observably similar to the injured worker[] prior to the injury” (see 2004 RAND Study, at p. 3).
23 Moreover, the RAND Studies had been provided with access to EDD wage data regarding the
24
25

26 _____
27 ¹⁶ We deem it unnecessary, at this point, to determine how any such projections might be made. If, on remand, the WCJ concludes that earnings estimates must be projected, he may decide this question in the first instance.

1 quarterly earnings of each control group worker, as reported by his or her employer(s). (See 2003
2 RAND Study, at p. 18; 2004 RAND Study, at pp. 2-3.)¹⁷

3 However, when dealing with the workers' compensation claim of a particular injured
4 employee, the earnings of "similarly situated employees" generally cannot be established through
5 EDD wage data on each individual co-worker. This is because, absent an applicable exception,
6 wage information gathered by EDD is confidential. (Unemp. Ins. Code, §§ 1094, 2111.)
7 Moreover, in most cases, there will be significant limitations on the compelled disclosure of wage
8 information by a co-worker or the co-worker's employer. Under the privacy provisions of the
9 California Constitution (Cal. Const., art. I, § 1), "the right of privacy extends to one's confidential
10 financial affairs" and, unless there is a compelling public interest, third parties have a right "to
11 maintain reasonable privacy regarding their financial affairs." (*Valley Bank of Nevada v. Superior*
12 *Court* (1975) 15 Cal.3d 652, 656-657; see also *Rhooms*, 42 Cal.App.4th at p. 1287 [61
13 Cal.Comp.Cases at p. 169] ("The right to privacy in disclosure of financial information affects the
14 scope of discovery."))

15 Accordingly, in the usual case, the earnings of "similarly situated employees" will have to
16 be estimated. This may be accomplished in several ways. Often, empirical wage data on
17 "similarly situated employees" may be gathered from EDD's Labor Market Information Division
18 (LMID) website¹⁸ The LMID website aggregates the wage information of a large number of
19 workers within a particular occupation for particular time periods, either statewide or by county.
20 For example, LMID's Occupational Employment Statistics (OES) website currently provides wage
21 data by occupation and geographic area for one quarter of each year from 2001 through 2008.¹⁹

22 _____
23 ¹⁷ The RAND Studies were conducted under contracts with the California Commission on Health and Safety
24 and Workers' Compensation and the California Division of Workers' Compensation. (See 2003 RAND Study, at p. v;
25 2004 RAND Study, at p. iii.) According to EDD's website, it may provide confidential information to government
26 agencies or their contractors for economic planning and development purposes," however, the "[r]ecipients of
27 confidential data may use it only for statistical purposes and are restricted from releasing it to unauthorized parties"
(<http://www.labormarketinfo.edd.ca.gov/article.asp?ARTICLEID=1222&SEGMENTID=3>).

¹⁸ The LMID home page is at <http://www.labormarketinfo.edd.ca.gov/>.

¹⁹ See <http://www.labormarketinfo.edd.ca.gov/?pageid=152>. This website provides information on the mean
hourly wage, mean annual wage, 25th percentile hourly wage, 50th percentile (median) hourly wage, and 75th
percentile hourly wage for each calendar year, by occupation and county (or other regional area). Because the
gathering and compilation of this wage data is so labor-intensive, the LMID OES website provides wage data for only
one quarter of each year. However, extrapolations may be made from this quarterly data, if necessary.

1 Wage information also can be found at LMID’s Occupational Profile website²⁰ and its
2 Occupational Wages Data Search Tool website.²¹ Additional wage data is available at the website
3 of the United States Department of Labor, Bureau of Labor Statistics (BLS), which covers
4 geographical areas within the United States, both inside and outside of California.²²

5 In some cases, though, there may be problems with or limitations to LMID website wage
6 data because, for example, the data may not cover or be adequate for the occupation, geographic
7 area, and/or time frames in question – or it simply may be difficult or unduly time-consuming to
8 find. Therefore, to estimate the earnings of “similarly situated employees,” it may be appropriate
9 for a party to obtain customized empirical wage information from EDD.²³ Alternatively, it may be
10 appropriate to hire a vocational expert to obtain the empirical wage information data.

11 In other cases, however, the earnings of similarly situated employees can be established
12 directly. These might include, for example: (1) public employment cases, such as the case before
13 us,²⁴ (2) cases where the co-workers’ wages are established by a collective bargaining agreement,
14 which also may be applicable to the case before us,²⁵ or (3) cases where co-workers voluntarily
15 disclose their wage information.²⁶ Of course, where the earnings of “similarly situated employees”
16 may be directly established, such direct empirical wage data may be used in lieu of earnings
17 estimates.

18 **c. Determining The Injured Employee’s Estimated Earnings Loss.**

20 ²⁰ See <http://www.labormarketinfo.edd.ca.gov/cgi/databrowsing/occxplorersselection.asp?menuchoice=occxplorer>.

21 ²¹ See <http://www.labormarketinfo.edd.ca.gov/cgi/dataanalysis/areaselection.asp?tablename=oeswage>.

22 ²² See, e.g., <http://www.bls.gov/bls/blswage.htm> or <http://www.bls.gov/data/>. BLS wage data may be useful,
for example, in the case of an injured employee who is working outside of California but who is nevertheless covered
by California’s workers’ compensation laws. (See Lab. Code, §§ 5305, 3600.5(a).)

23 ²³ For a fee, LMID can produce various kinds of customized reports. (See <http://www.labormarketinfo.edd.ca.gov/article.asp?ARTICLEID=1222>.)

24 ²⁴ See *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court*
(2007) 42 Cal.4th 319 (salaries of public employees are not exempt from public disclosure under the California Public
Records Act and are not protected by the constitutional right to privacy because “public employees do not have a
reasonable expectation of privacy in the amount of their salaries”).

25 ²⁵ Cf., Lab. Code, § 1773 (in determining prevailing wage rates for public works, consideration is given to
collective bargaining agreements, within the locality and in the nearest labor market area, or data from the labor
organizations and employers or employer associations concerned, including the recognized collective bargaining
representatives for the particular craft, classification, or type of work involved).

26 ²⁶ See Lab. Code, § 232.

1 The third step, consistent with section 4660(b)(2) and the RAND Studies, is to determine
2 the injured employee’s estimated earnings loss. This is done by subtracting the actual or estimated
3 post-injury earnings of the injured employee from the average earnings of his or her corresponding
4 control group during the same three-year (or other) period.

5 **d. Determining The Injured Employee’s Proportional Earnings Loss.**

6 Consistent with section 4660(b)(2) and the RAND Studies, the fourth and final step of this
7 phase is to determine the injured employee’s proportional earnings loss. This is accomplished by
8 dividing his or her estimated earnings loss during the three-year (or other) post-injury period by the
9 average earnings of his or her corresponding control group during the same period.

10 **e. Illustrating The Four Steps To Determining Proportional Earnings Loss.**

11 To illustrate, we will use the following hypothetical. Based on an injured employee’s EDD
12 wage data, the employee earned a total of \$25,000 during the three years following the injury.
13 Based on EDD-LMID wage data, the average earnings of the employee’s “control group” for the
14 same period were \$150,000.²⁷ Therefore, the injured employee’s estimated earnings loss during
15 this period would be \$125,000 (i.e., \$150,000 – \$25,000 = \$125,000). Accordingly, the injured
16 employee’s proportional earnings loss would be 0.83 or 83% ($\$125,000 \div \$150,000 = 0.83$).²⁸

17 After the injured employee’s proportional earnings loss has been established, it is then time
18 to move on to the next phase for determining whether the DFEC portion of the 2005 Schedule has
19 been rebutted.

20 **3. Consistent With Section 4660(b)(2) And The RAND Study Data To Which It Refers, The**
21 **Second Phase In Determining Whether The DFEC Portion Of The 2005 Schedule Has Been**
22 **Rebutted Is To Divide The Employee’s Standard Whole Person Impairment Rating By His**
Or Her Proportional Earnings Loss To Calculate An Individualized Ratio Of Rating Over

23 ²⁷ Incidentally, this is consistent with most recent U.S. Department of Labor data on the state average weekly
wage (SAWW) in California, which is \$956.20 per week or roughly \$49,859 per year. (See Division of Workers’
Compensation Newsline No. 66-08, at http://www.dir.ca.gov/dwc/dwc_newslines/2008/Newsline_66-08.html.)

24 ²⁸ LMID’s Occupational Employment Statistics website does not list empirical wage data for every
25 occupational group in every county. Moreover, “Bus Drivers, Transit and Intercity” for San Francisco County is one
26 of the very few regional occupational groups for which wage data is not listed for certain years. If, however, relevant
27 wage data on applicant’s “similarly situated employees” cannot be obtained from the LMID website, then that wage
data might be obtained by other means. For example, applicant was a county-employed transit operator. Therefore,
consistent with the discussion above, wage data on similarly situated employees might be obtained by making a
Public Records Act request and/or by reference to a collective bargaining agreement. Also, analogies conceivably
could be made to “Bus Drivers, Transit and Intercity” for another county or counties in the Bay Area. However, we
leave these issues for the WCJ to resolve in the first instance.

1 **Proportional Earnings Loss.**

2 As discussed above, the language of 4660(b)(2) specifically calls for consideration of
3 empirical data and findings from the 2003 RAND Study and other empirical data – which, of
4 course, would include the 2004 RAND Study. The 2003 RAND Study divided each individual
5 injured employee’s actual final permanent disability rating by his or her estimated proportional
6 earnings loss to come up with a rating to proportional earnings loss ratio. The 2004 RAND Study
7 refined this data by using each injured employee’s actual standard permanent disability rating,
8 instead of the final rating.

9 Therefore, consonant with the language of 4660(b)(2) and its reference to RAND, the next
10 phase in any attempt to rebut the DFEC portion of the 2005 Schedule is to take the injured
11 employee’s standard WPI rating and then divide this rating by his or her estimated proportional
12 earnings loss, to come up with an individualized rating to proportional earnings loss ratio (rating to
13 loss ratio).

14 Thus, using the example above, if the injured employee’s individualized proportional
15 earnings loss is 0.83 or 83%, and his or her whole person impairment is 5%, then the
16 individualized rating to loss ratio would be 0.06024 (i.e., $5\% \div 83\% = 0.06024$).

17 **4. Determining Whether An Injured Employee’s Individualized Ratio Of Rating Over**
18 **Proportional Earnings Loss Rebutts The DFEC Portion Of The 2005 Schedule.**

19 As discussed above, the 2005 Schedule basically took the average standard ratings to
20 average proportional earnings losses ratios for various impairments (i.e., body parts) from Table 5
21 of the 2004 RAND Study and incorporated these ratios into Table B of the Schedule. Then, the
22 2005 Schedule compressed all of these proportional earnings loss ratios into eight FEC Ranks and
23 assigned a DFEC adjustment factor to each rank. For example, FEC Rank One, which included
24 impairments that had average ratings to proportional earnings loss ratios within the range of 1.647
25 to 1.810, was assigned a DFEC adjustment factor of 1.100000.

26 **a. Situations In Which The 2005 Schedule Is Not Rebutted.**

27 In light of this, we conclude that the Schedule is *not* rebutted if the injured employee’s
individualized rating to loss ratio either (1) is the *same* as the ratio contained in Table B of the

1 2005 Schedule for the same impairment (i.e., body part) or (2) falls within the range of ratios of the
2 FEC Rank for that impairment (and, therefore, takes the same DFEC adjustment factor as the
3 impairment otherwise would).

4 To illustrate, we will examine a hypothetical neck impairment. Under the Schedule, the
5 average rating to loss ratio for neck impairments is 1.060, which is within FEC Rank Five. (2005
6 Schedule, at p. 1-7 [Table B].) Yet, FEC Rank Five also includes all rating to loss ratios ranging
7 from 0.963 to 1.133, and all the ratios within that Rank take a DFEC adjustment factor of
8 1.271429. (2005 Schedule, at p. 1-7 [Table A].) Thus, if the evidence presented establishes that an
9 injured employee with a neck impairment has an individualized rating to loss ratio of 1.060, then
10 that ratio is no different than the 1.060 average ratio listed by the Schedule for neck impairments.
11 Therefore, the Schedule has not been rebutted and the employee's standard WPI rating would be
12 multiplied by the DFEC adjustment factor of 1.271429, i.e., the adjustment factor for FEC Rank
13 Five. However, the same would be true if the evidence establishes an individualized rating to loss
14 ratio of anywhere between 0.963 to 1.133, because these ratios also fall within FEC Rank Five and
15 also take a DFEC adjustment factor of 1.271429. Accordingly, in either case, a hypothetical whole
16 person impairment rating of 5% for the neck would adjust to 6% (i.e., $1.271429 \times 5\% = 6.357145$),
17 before adjustment for age and occupation.²⁹ A hypothetical neck impairment rating of 25% would
18 adjust to 32% (i.e., $1.271429 \times 25\% = 31.785725$), before adjustment for age and occupation.

19 **b. Situations In Which The 2005 Schedule Is Rebutted.**

20 If, however, the employee's individualized rating to loss ratio (1) is *less than or greater*
21 *than* the ratio contained in Table B of the 2005 Schedule for the same impairment (i.e., body part)
22 *and* (2) falls outside of the range of ratios of the FEC Rank for that impairment, then the Schedule
23 has been rebutted. What happens next depends on whether the individualized rating to loss ratio
24 does or does not fall within any of the range of ratios for the other seven FEC Ranks.

25 **i. Where The Individualized Rating To Proportional Wage Loss Ratio Falls Outside The**
26 **Range Of Ratios Of The FEC Rank For The Particular Impairment, But Falls Within The**

27 ²⁹ The Schedule provides that when a standard whole person impairment rating is multiplied by the appropriate
DFEC adjustment factor, the product is rounded to the nearest whole number percentage. (2005 Schedule, at pp. 1-6 –
1-7.)

1 **Range Of Ratios For One Of The Other Seven FEC Ranks.**

2 If the individualized rating to loss ratio falls within one of the other seven range of ratios in
3 Table A of the 2005 Schedule, then the FEC Rank and DFEC adjustment factor corresponding to
4 that particular range of ratios shall be used, even if it results in a higher or lower FEC Rank and a
5 higher or lower DFEC adjustment factor than what the Schedule itself would establish for the
6 particular impairment (body part) involved.

7 For example, let us once again take a hypothetical injured employee with a neck
8 impairment. As discussed above, under the Schedule, neck impairments have an average rating to
9 loss ratio of 1.060, which falls within FEC Rank Five. FEC Rank Five includes all average ratings
10 to loss ratios that range from 0.963 to 1.133 – and all ratios within FEC Rank Five’s range take a
11 DFEC adjustment factor of 1.271429. If, however, the evidence establishes that a particular
12 employee’s individualized rating to loss ratio is 0.525, then that ratio falls within the 0.450 to
13 0.620 range of ratios and for FEC Rank Eight, which takes a DFEC adjustment factor of 1.400000.
14 Thus, in calculating the employee’s permanent disability rating, the 1.400000 DFEC adjustment
15 factor would be used, instead of the 1.271429 adjustment factor ordinarily used for neck
16 impairments per the Schedule. In that circumstance, a hypothetical neck impairment rating of 5%
17 would adjust to 7% (i.e., $1.400000 \times 5\% = 7.000000$), before adjustment for age and occupation.
18 A hypothetical neck impairment rating of 25% would adjust to 35% (i.e., $1.400000 \times 25\% =$
19 35.000000), before adjustment for age and occupation.

20 On the other end of the spectrum, however, let us assume it is shown that the injured
21 employee’s individualized rating to loss ratio is 1.720. Because 1.720 falls within the range of
22 ratios for FEC Rank One (i.e., 1.647 to 1.810), then the DFEC adjustment factor of 1.100000 for
23 that Rank would be used to rate the neck impairment, rather than the 1.271429 adjustment factor
24 for neck impairments under the Schedule. In that circumstance, a hypothetical neck impairment
25 rating of 5% would adjust to 6% (i.e., $1.100000 \times 5\% = 5.500000$), before adjustment for age and
26 occupation. A hypothetical neck impairment rating of 25% would adjust to 28% (i.e., $1.100000 \times$
27 $25\% = 27.500000$), before adjustment for age and occupation.

1 Therefore, where it is established that an individual employee’s particularized rating to loss
2 ratio is *somewhat* higher or *somewhat* lower than the average rating to loss ratio for his or her
3 impairment under the Schedule – but the employee’s ratio still falls within the range of ratios for
4 one of the seven other FEC Ranks of the Schedule, then the DFEC adjustment factor used to
5 multiply the employee’s WPI under the AMA Guides generally will be *somewhat* lower or
6 *somewhat* higher than the adjustment factor called for by the Schedule. Nevertheless, in these
7 *somewhat* lower or higher situations, when the employee’s WPI is multiplied by this unscheduled
8 DFEC adjustment factor, the resulting adjusted rating is not dramatically different than the rating
9 the Schedule would provide.

10 The bigger question, though, is what happens if the injured employee’s individualized
11 rating to loss ratio does *not* fall within any of the range of ratios for the eight FEC Ranks in Table
12 A of the 2005 Schedule – that is, if the employee’s individualized ratio is *higher than 1.810* (i.e.,
13 the highest average ratings to wage loss ratio within FEC Rank One) or if the individualized ratio
14 *is lower than 0.450* (i.e., the lowest average ratings to wage loss ratio within FEC Rank Eight).

15 **ii. Where The Individualized Rating To Proportional Wage Loss Ratio Falls Outside All Of**
16 **The Range Of Ratios For All FEC Ranks.**

17 We conclude that if the employee’s individualized rating to loss ratio does *not* fall within
18 any of the range of ratios for any of the eight FEC Ranks, then the employee’s DFEC adjustment
19 factor shall be determined by applying the formula of $([1.81/a] \times .1) + 1$, where “a” is the
20 employee’s individualized rating to loss ratio. This approach is appropriate because it is consistent
21 with section 4660(b)(2)’s requirement that a “numeric formula” be used and because the Schedule
22 used this very same numeric formula for determining its minimum and maximum DFEC
23 adjustment factors. (2005 Schedule, at p. 1-6 [paragraph (a)-4].)

24 To illustrate applications of this formula, we will use some hypothetical scenarios, all
25 involving hypothetical neck impairments.

26 The opening scenario is a hypothetical 5% neck impairment rating and a hypothetical
27 individualized proportional earnings loss of 0.83 or 83% (as in the hypothetical at pp. 27-28,
supra). To start, the 5% rating (i.e., 0.05) is divided by the 83% (i.e., 0.83) proportional earnings

1 loss to get an individualized rating to loss ratio of 0.060 (i.e., $5 \div 83 = 0.06024$ or $0.05 \div 0.83 =$
2 0.06024). This individualized ratio of 0.060 falls well below any of the range of ratios within
3 Table A of the 2005 Schedule (i.e., it is nearly ten times lower than the 0.450 to 0.620 range of
4 ratios for FEC Rank Eight). Accordingly, in this scenario, the 0.060 will now be substituted for
5 the “a” in the $([1.81/a] \times .1) + 1$ formula found on page 1-6 of the Schedule. In accordance with
6 this formula, the 1.81 is divided by the 0.060, resulting in 30.166666 (i.e., $1.81 \div 0.060 =$
7 30.166666). Then, per the formula, this 30.166666 is multiplied by 0.1, resulting in 3.016666 (i.e.,
8 $30.166 \times 0.1 = 3.016666$). Finally, per the formula, 1.0 is added to the 3.016666, resulting in
9 4.016666 (i.e., $3.016666 + 1 = 4.016666$). Accordingly, in this hypothetical 5% neck impairment
10 and 0.83 individualized proportional earnings loss scenario, an individualized DFEC adjustment
11 factor of 4.016666 would be used to multiply the injured employee’s 5% standard impairment
12 rating, resulting in a partially adjusted impairment rating (before adjustment for age and
13 occupation) of 20% (i.e., $4.016666 \times 5\% = 20.083333\%$). This rating is roughly three times higher
14 than the 6% partially adjusted rating (before adjustment for age and occupation) that would have
15 resulted if the Scheduled DFEC adjustment factor of 1.271429 had been applied.

16 The second scenario is a hypothetical 25% neck impairment rating and a hypothetical
17 individualized proportional earnings loss of 0.83. To start, the 25% rating (i.e., 0.25) is divided by
18 the 0.83 proportional earnings loss to get an individualized rating to loss ratio of 0.301 (i.e., $0.25 \div$
19 $0.83 = 0.301$). This individualized 0.301 ratio is once again lower than any of the average rating to
20 loss ratio for neck impairments for any of the FEC Ranks of the Schedule (although not
21 significantly lower than the 0.450 lowest ratio for FEC Rank Eight). Therefore, the 0.301 ratio is
22 substituted for the “a” in the $([1.81/a] \times .1) + 1$ formula found on page 1-6 of the Schedule. So,
23 first, the 1.81 is divided by the 0.301, resulting in 6.013289 (i.e., $1.81 \div 0.301 = 6.013289$). Next,
24 in accordance with the formula, this 6.013289 is multiplied by 0.1, resulting in 0.601329 (i.e., 6.01
25 $\times 0.1 = 0.601329$). Finally, per the formula, 1.0 is added to the 0.601329, resulting in 1.601329
26 (i.e., $0.601329 + 1 = 1.601329$). Accordingly, in this hypothetical 25% neck impairment and 0.83
27 proportional earnings loss scenario, an individualized DFEC adjustment factor of 1.601329 would

1 be used to multiply the injured employee’s 25% standard impairment rating, resulting in a partially
2 adjusted impairment rating (before adjustment for age and occupation) of 40% (i.e., $1.601329 \times$
3 $25\% = 40.033222\%$). This 40% rating represents an approximately 25.8% increase over the 32%
4 partially adjusted rating that would have resulted if the Scheduled DFEC adjustment factor of
5 1.271429 had been applied (i.e., $1.271429 \times 25\% = 31.785725$).

6 Accordingly, where an injured employee’s individualized rating to proportional earnings
7 loss ratio is lower than the lowest average rating to proportional earnings loss ratio in Table A of
8 the Schedule, then the employee’s partially adjusted rating (before adjustment for age and
9 occupation) can be higher than the partially adjusted rating called for by the Schedule. This is
10 consistent with the principles that, notwithstanding the Schedule, an injured employee’s permanent
11 disability award should “accurately reflect[] his [or her] true disability” (*Glass*, 105 Cal.App.3d at
12 p. 307 [45 Cal.Comp.Cases at p. 449]), it should not be “inequitable” and “so disproportionate to
13 the disability and the objectives of reasonably compensating an injured worker as to be
14 fundamentally unfair” (*Lewis, supra*, 99 Cal.App.3d at p. 659 [44 Cal.Comp.Cases at p. 1140]),
15 and it should be “commensurate with the disability that he [or she] has suffered” (*Luchini*, 7
16 Cal.App.3d at p. 146 [35 Cal.Comp.Cases at p. 209]).

17 **5. Possible Exceptions To Using The Foregoing Method.**

18 The foregoing method for determining whether the DFEC portion of the 2005 Schedule has
19 been rebutted – and, if so, for determining an individualized DFEC adjustment factor – may be
20 used in most cases. Nevertheless, there may be exceptions where the foregoing method should not
21 be used.

22 For example, an individualized proportional earnings loss can be negative when the injured
23 employee’s post-injury earnings exceed that of his or her corresponding control group. (See 2004
24 RAND Study, at p. 4.) Moreover, although we believe that the following scenario is likely to be
25 rare (since, in most cases, an injured employee’s post-injury earnings likely will be less than or
26 about the same as his or her control group), if the control group’s post-injury earnings are very low
27 relative to the post-injury earnings of the injured employee, then this negative number can

1 approach infinity. (*Id.*) The RAND Study was able to deal with such “outliers” by “trimming” the
2 “extreme” numbers from the study data in order to bring the *average* proportional earnings loss to
3 “sensible” and “reasonable levels.” (*Id.*, at pp. 4-7.) Of course, the RAND Study data involved
4 hundreds of thousands of injured employees, so it was possible for the study to eliminate data for a
5 small percentage of individual employees for averaging purposes. However, in assessing whether
6 the DFEC portion of the 2005 Schedule has been rebutted in a particular injured employee’s case,
7 it is not possible to disregard all of the earnings data relating to that employee. Therefore, in cases
8 where the injured employee’s actual post-injury earnings are significantly higher than the earnings
9 of his or her control group during the same period, some alternative method may have to be
10 utilized to determine whether the Schedule has been rebutted and, if so, how the employee’s
11 overall permanent disability rating should be calculated. We need not resolve this question now,
12 however.³⁰

13 Also, there may be instances where it is not proper to use the injured employee’s actual
14 post-injury earnings in determining his or her proportional earnings loss. In establishing their
15 average proportional earnings loss figures, the 2003 and 2004 RAND Studies followed three years
16 of post-injury earnings for 241,685 employees who had sustained industrial injuries over a more
17 than six-year period between January 1, 1991 and April 1, 1997. Given the large number of
18 employees and the broad period of time involved in the RAND Studies, those Studies had no need
19 to consider (and, as a practical matter, probably could not consider) factors that may have skewed
20 the post-injury earnings of particular employees. Yet, when a proportional earnings loss
21 calculation is made for a particular employee in a DFEC rebuttal case, the employee’s post-injury
22 earnings portion of that calculation may not accurately reflect his or her true earning capacity. As
23 the Supreme Court stated years ago in *Argonaut Ins. Co. v. Industrial Acc. Com. (Montana)* (1962)
24 57 Cal.2d 589 [27 Cal.Comp.Cases 130, 133] (*Montana*):

25 “An estimate of earning capacity is a prediction of what an
26 employee’s earnings would have been had he not been injured. ...

27 ³⁰ We do observe, though, that conceivable alternatives might be to throw out certain earnings periods for the control group (e.g., if their low earnings are due to some unusual time-limited circumstances) or to use a broader control group.

1 [A] prediction [of earning capacity for purposes of permanent
2 disability] is ... complex because the compensation is for loss of
3 earning power over a long span of time. ... In making a permanent
4 award, [reliance on an injured employee's] earning history alone
5 may be misleading. ... [A]ll facts relevant and helpful to making
6 the estimate must be considered. The applicant's ability to work,
his age and health, his willingness and opportunities to work, his
skill and education, the general condition of the labor market, and
employment opportunities for persons similarly situated are all
relevant." (*Montana, supra*, 57 Cal.2d at pp. 594-595 [27
Cal.Comp.Cases at p. 133] (internal citations omitted).)

7 Certainly, an individual employee should not be able to manipulate the proportional earnings loss
8 calculation through malingering or otherwise deliberately minimizing his or her post-injury
9 earnings. Similarly, motivational or other factors may play a role in determining whether a
10 particular employee's post-injury earnings accurately reflect his or her true post-injury earning
11 capacity. Further, an employee may voluntarily retire or partially retire for reasons unrelated to the
12 industrial injury. (*Pham v. Workers' Comp. Appeals Bd.* (2000) 78 Cal.App.4th 626, 637-638 [65
13 Cal.Comp.Cases 139]; *Gonzalez v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 843, 847-
14 848 [63 Cal.Comp.Cases 1477, 1478-1479].) Temporary economic downturns or other factors
15 may also come into play. Accordingly, the trier-of-fact may need to take a variety of factors into
16 consideration.

17 The foregoing examples, however, are merely illustrative of some instances where it *might*
18 be inappropriate to use the method set out above. These examples are neither all-inclusive nor
19 absolute. The question of whether the DFEC rebuttal method discussed above should or should
20 not be used in any particular case must be determined on a case-by-case basis. Moreover, when the
21 foregoing method is not appropriate, it initially will be up to the assigned WCJ to decide what
22 alternative method might be used.

23 **6. Comments On The Dissent.**

24 Preliminarily, the dissent essentially takes the position that section 4660 is strictly a
25 permanent disability *schedule* statute. That is, the dissent asserts that section 4660 does not define
26 "permanent disability"; instead, it merely sets forth the criteria for the Administrative Director to
27 use in preparing and amending permanent disability rating schedules. The dissent's basic

1 premise, therefore, is that when the 2005 Schedule has been rebutted, it takes the determination of
2 the injured employee’s permanent disability entirely outside of section 4660.

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9 We agree that section 4660 does not define the term “permanent disability” per se.³¹
10 Nevertheless, as discussed earlier in our opinion, section 4660(a) specifically sets forth what
11 factors are to be considered “[i]n determining the percentages of permanent disability” – including
12 the injured employee’s “diminished future earning capacity.” Moreover, the first sentence of
13 section 4660(b)(2) states that, “[f]or purposes of *this section*, diminished future earning capacity
14 shall be a numeric formula based on empirical data and findings that aggregate the average
15 percentage of long-term loss of income resulting from each type of injury for similarly situated
16 employees.” (Emphasis added.) Then, the second sentence of section 4660(b)(2) makes clear that
17 the “empirical data and findings” to which the first sentence refers come from the 2003 RAND
18 Study and other similar studies (such as the 2004 RAND Study). As we have emphasized, the
19 RAND Studies compared the post-injury earnings of a large number of industrially disabled
20 workers to the earnings over the same time periods of each employee’s relevant control group.

21 Given the express language of section 4660, we conclude that a method of “determining
22 the percentages of permanent disability” that bears absolutely no relationship to the statutory

23 ³¹ In its recent decision in *Brodie*, the Supreme Court said:

24 “ [P]ermanent disability is understood as “the irreversible residual of an
25 injury.” ’ (*Kopping v. Workers’ Comp. Appeals Bd.* (2006) 142 Cal.App.4th
26 1099, 1111 [71 Cal.Comp.Cases 1229], quoting 1 Cal. Workers’ Compensation
27 Practice (Cont.Ed.Bar 4th ed. 2005) § 5.1, p. 276, italics omitted.) ‘A permanent
disability is one “... which causes impairment of earning capacity, impairment
of the normal use of a member, or a competitive handicap in the open labor
market.” ’ (*State Compensation Ins. Fund v. Industrial Acc. Com.*
[*Hutchinson*] (1963) 59 Cal.2d 45, 52 [28 Cal.Comp.Cases 20].)” (*Brodie*, 40
Cal.4th at p. 1320 [72 Cal.Comp.Cases at p. 571] (footnote omitted;
Cal.Comp.Cases citations substituted for other parallel citations).)

1 scheme cannot be justified. Accordingly, we cannot accept a method that determines an injured
2 employee's permanent disability percentage by equating it with a vocational expert's opinion of
3 the employee's diminished future earning capacity, particularly where the expert's definition of
4 "diminished future earning capacity" is completely at variance with the language of section 4660
5 and where the expert's opinion does not consider the injured employee's earnings in relation to
6 "similarly situated employees."

7 Moreover, we find none of the dissent's several criticisms of the DFEC rebuttal method
8 we have adopted to be persuasive.

9 The dissent suggests that our DFEC rebuttal method "will also require [the use of]
10 vocational experts in some cases to estimate [an] applicant's long-term earnings" and that,
11 therefore, our method will not further the Legislature's intent to reduce costs (see Stats. 2004, ch.
12 34, § 49) any more than the method suggested by the dissent. The dissent miscomprehends our
13 DFEC rebuttal approach. Our approach relies on earnings information that generally may be
14 obtained without the use of vocational experts. The injured employee's own wage data may be
15 obtained from EDD; wage data regarding similarly situated employees may be obtained from
16 EDD's readily accessible LMID websites. Once this wage data is obtained, it is a relatively
17 simple matter to calculate the injured employee's proportional earnings loss³² and, from there, to
18 calculate his or her individualized rating to proportional earnings loss ratio.³³ After that, it is easy
19 to determine whether the employee's individualized rating to proportional earnings loss ratio falls
20 within any of the ranges of ratios of FEC Ranks One to Eight. If it does, then the corresponding
21 scheduled DFEC adjustment factor is used. If it does not, then the employee's individualized
22 DFEC adjustment factor is determined by application of the comparatively non-complex numeric
23 formula $([1.81/a] \times .1) + 1$, where "a" corresponds to the employee's individualized rating to
24 proportional earnings loss ratio. Therefore, vocational experts, if necessary at all, might be
25 needed only for exceptional cases where there is no EDD LMID wage data for similarly situated

26 ³² That is, it is a simple formula of $[a - b] \div a = c$, where "a" is the earnings of similarly situated employees,
"b" is the injured employee's earnings, and "c" is the proportional earnings loss.

27 ³³ That is, it is a simple formula of $a \div b = c$, where "a" is the injured employee's whole person impairment
rating, "b" is his or her proportional earnings loss, and "c" is the rating to proportional earnings loss ratio.

1 workers. In such circumstances, however, the vocational experts would be used only for the
2 limited purpose of gathering or estimating wage data for similarly situated workers. However, in
3 any case where a party attempts to rebut the DFEC portion of the 2005 Schedule, the method
4 suggested by the dissent will *always* require paid vocational experts, who will have to do
5 *extensive* analyses (see below). Moreover, as a practical matter, the dissent's proposed method
6 will largely be unavailable to unrepresented injured employees, who will rarely have the
7 knowledge and ability to identify and properly utilize vocational experts.

8 Of course, we recognize that not all unrepresented injured employees will have access to
9 or the expertise to use a computer to obtain EDD LMID wage data, or will not have the
10 mathematical background to apply the $([1.81/a] \times .1) + 1$ formula. In such instances, however,
11 an unrepresented injured employee may obtain free assistance from the Information and
12 Assistance Office. (See Lab. Code, § 5450; Cal. Code Regs., tit. 8, § 9924(b).) Also, the WCAB
13 could order a defendant to obtain the wage data.

14 The dissent also asserts that our DFEC rebuttal method is “designed to apply to only an
15 undefined subset of cases in which a party may be able to rebut the [DFEC portion of] the 2005
16 Schedule.” The dissent is correct, as we expressly acknowledge above, that it might be
17 inappropriate to use our DFEC rebuttal method in some cases. Yet, we believe it will be rare that
18 an injured employee's actual post-injury earnings are significantly higher than the earnings of his
19 or her control group during the same period (and extraordinarily rare that the control group's
20 earnings will be zero). Moreover, we have footnoted some conceivable alternative approaches in
21 such situations. Also, in calculating an individual injured employee's proportional earnings loss,
22 there may be occasions where the portion of that calculation relating to the employee's post-injury
23 earnings will not accurately reflect his or her true earning capacity – or where the employee's
24 diminished post-injury earnings are partially caused by factors other than the injury itself. These
25 problems, however, will also exist when vocational experts assess an injured employee's post-
26 injury earning capacity. So, in either case, the question will have to be resolved by the trier-of-
27 fact.

1 Finally, the dissent suggests that its proposed approach is “operationally simple” and
2 follows the principle of Occam’s razor, i.e., that “the simplest of competing theories should be
3 preferred over more complex and subtle ones.” (*Brodie*, 40 Cal.4th at p. 1328, fn. 10 [72
4 Cal.Comp.Cases at p. 577, fn. 10].) Yet, while the Occam’s razor principle may be valid when
5 construing a statute in a manner consistent with its language and intent, the Occam’s razor
6 principle cannot trump that language and intent. In any event, we do not agree that the dissent’s
7 proposed method is simpler than our approach. While it may be relatively easy to *hire* a
8 vocational expert, our experience informs us that the DFEC analyses performed by vocational
9 experts are quite involved and complex. This is readily evidenced by the vocational expert reports
10 in this case.

11 The February 16, 2008 report of defendant’s vocational expert, Dr. Van de Bittner, is 21
12 single-spaced pages long, including extensive discussions of applicant’s personal/social/financial
13 information, her medical information, her work history, her vocational testing (including Dvorine
14 Color Vision test, Wide Range Achievement test, Wechsler Abbreviated Scale of Intelligence test,
15 Purdue Pegboard test, Bennett Hand-Tool Dexterity test, Minnesota Clerical test, Bennett
16 Mechanical Comprehension test, and Gates-MacGinitie Reading tests), her transferable skills
17 analysis, her rehabilitation plan options, and an analysis of her access to the labor market. It
18 concludes with four pages of calculations regarding applicant’s pre-injury earning capacity, post-
19 injury earning capacity, and diminished future earning capacity. Then, appended to the report are
20 four pages of source references (*including four EDD-LMID wage data websites*), 10 pages of test
21 results and data analysis, and 12 pages of record review (i.e., medical records, vocational
22 rehabilitation records, investigation reports and videotape and other documents). Thus, Dr.
23 Vander Bittner took 48 pages to reach his conclusions.

24 The September 25, 2007 report of applicant’s vocational expert, Mr. Malmuth, is 24
25 single-spaced pages long, including a discussion of his methodology and an extensive discussion
26 of applicant’s personal/social/financial information, her activities of daily living, her medication,
27 her medical information, her work and educational history, her vocational testing (including

1 verbal ability, arithmetic reasoning, computation, spatial ability, form perception, clerical
2 perception, motor coordination, finger dexterity, and manual dexterity), an analysis of her
3 transferable skills, a determination of medically and vocationally suitable post-injury occupations,
4 a discussion of occupational employment statistics (including pre-injury and post-injury OES
5 wages), and conclusions regarding her diminished future earning capacity. The report appends
6 five pages of pre-injury earning capacity, post-injury earning capacity, and diminished earning
7 capacity calculations. It also appends 13 pages of miscellaneous material, including discussions
8 of the AMA Guides, various provisions of the Code of Federal Regulations, and the Dictionary of
9 Occupational Titles – as well as a six-page unpublished appellate decision. Thus, Mr. Malmuth
10 took 42 pages to reach his conclusions.

11 Accordingly, we fail to see how the dissent’s proposed approach is “simpler” than the
12 approach we have adopted. As we stated at the outset, our DFEC rebuttal approach basically boils
13 down to (1) obtaining two sets of wage data (one for the injured employee and one for similarly
14 situated employees), (2) doing some simple mathematical calculations with that wage data to
15 determine the injured employee’s proportional earnings loss, (3) dividing the employee’s whole
16 person impairment by the proportional earnings loss to obtain a ratio, and (4) seeing if the ratio
17 falls within certain ranges of ratios in Table A of the 2005 Schedule. If it does, the determination
18 of the employee’s DFEC adjustment factor is simple. If it does not, then a non-complex formula
19 is used to do a few additional calculations to determine an individualized DFEC adjustment
20 factor.

21 **G. The Remaining Issues.**

22 Two ancillary issues raised by defendant’s petition still need to be addressed.

23 First, defendant asserts that, based on our en banc decisions in *Costa I*, 71 Cal.Comp.Cases
24 1797, and *Boughner v. CompUSA, Inc.*, 73 Cal.Comp.Cases 854, applicant has failed to meet her
25 burden of establishing that the presumptively correct 2005 Schedule is arbitrary, capricious, or
26 unreasonable. Defendant, however, completely misconstrues our decisions in *Costa I* and
27 *Boughner*. In those cases, the injured employees were attempting to establish that the

1 Administrative Director's regulation adopting the 2005 Schedule was inconsistent with its
2 authorizing statute and, therefore, the *entire* 2005 Schedule was invalid. Here, however, applicant
3 is not challenging the validity of the 2005 Schedule. Instead, she is merely attempting to rebut the
4 Scheduled permanent disability rating in her particular case. Both *Costa I* and *Costa II* specifically
5 recognized that a scheduled rating may be rebutted. (*Costa I*, 71 Cal.Comp.Cases at pp. 1817-
6 1819; *Costa II*, 72 Cal.Comp.Cases at pp. 1496-1497.)

7 Second, defendant asserts that the WCJ failed to list and admit defendant's Exhibit D,
8 which is a copy of a Domestic Return Receipt signed by applicant on January 17, 2007. Because
9 we are deferring and remanding the permanent disability and apportionment issues, we will leave it
10 to the trial judge to address this question in the first instance.

11 **III. CONCLUSION**

12 Because the WCJ's September 17, 2008 decision did not follow the correct method for
13 determining whether the DFEC portion of the 2005 Schedule has been rebutted, we will rescind his
14 findings on permanent disability, apportionment, and attorney's fees and remand this matter to the
15 WCJ for further proceedings and a new decision consistent with this opinion.

16 For the foregoing reasons,

17 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
18 Appeals Board (en banc), that the Findings and Award issued on September 17, 2008 is
19 **AMENDED** such that Findings of Fact Nos. 2 and 3 and the Award in its entirety are **STRICKEN**
20 therefrom and the following are **SUBSTITUTED** therefor:

21 **FINDINGS OF FACT**

22 ***

23 2. The issues of permanent disability and apportionment are
deferred, with jurisdiction reserved.

24 3. The issue of reasonable attorney's fees is deferred, with
jurisdiction reserved.

25 **AWARD**

26 **AWARD IS MADE** in favor of **WANDA OGILVIE** and against
27 the **CITY AND COUNTY OF SAN FRANCISCO**, Permissibly
Self-Insured, of:

1 (a) All further medical treatment reasonably required to cure or
2 relieve from the effects of the injury.

3 **IT IS FURTHER ORDERED** that this matter is **REMANDED** to the workers'
4 compensation administrative law judge for further proceedings and a new decision, consistent
5 with this opinion.

6 ***WORKERS' COMPENSATION APPEALS BOARD***

7 */s/ Joseph M. Miller*
8 *JOSEPH M. MILLER, Chairman*

9 */s/ James C. Cuneo*
10 *JAMES C. CUNEO, Commissioner*

11 */s/ Frank M. Brass*
12 *FRANK M. BRASS, Commissioner*

13 */s/ Alfonso J. Moresi*
14 *ALFONSO J. MORESI, Commissioner*

15 */s/ Deidra E. Lowe*
16 *DEIDRA E. LOWE, Commissioner*

17 */s/ Gregory G. Aghazarian*
18 *GREGORY G. AGHAZARIAN, Commissioner*

19 ***I DISSENT***
20 ***(See attached Dissenting Opinion)***

21 */s/ Ronnie G. Caplane*
22 *RONNIE G. CAPLANE, Commissioner*

23 ***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***

24 ***2/3/2009***

25 ***SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT***
26 ***THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:***

27 ***Wanda Ogilvie***
Office of the City Attorney
Law Office of Joseph C. Waxman

NPS/aml

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**DISSENTING OPINION OF
COMMISSIONER CAPLANE**

I concur with the majority in reaffirming our prior holdings that the 2005 Permanent Disability Rating Schedule (2005 Schedule) is rebuttable. However, following the principle of Occam’s razor,¹ I would hold that the 2005 Schedule is rebutted when a party proves that applicant’s diminished future earning capacity is disproportionate to the rating under the 2005 Schedule. I would further hold that once the 2005 Schedule is rebutted, the permanent disability rating is the percentage loss of future earning capacity. Therefore, I dissent.

The majority has outlined the history of section 4660 (Section II-A). Prior section 4660(a) provided: “In *determining the percentages of permanent disability*, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market” (emphasis added). Prior section 4660(b) provided in relevant part: “The administrative director may prepare, adopt, and from time to time amend a schedule *for the determination of permanent disabilities* in accordance with this section” (emphasis added). The permanent disability rating that resulted from the use of the schedule “is a numeric representation, expressed as a whole number percent, of the degree to which the permanent effects of the injury have *diminished the capacity of the employee to compete for and maintain employment in an open labor market*” (*Schedule for Rating Permanent Disabilities* (April 1997), page 1-2 (emphasis added)).

Section 4660(a) now provides: “In *determining the percentages of permanent disability*, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee’s diminished future earning capacity” (emphasis added). Sections 4660(b)(1) and (b)(2) define “nature of physical injury or disfigurement” and “diminished future earning

¹ “[T]he simplest of competing theories should be preferred over more complex and subtle ones.” (*Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1329, fn. 10 [72 Cal.Comp.Cases 565, 577, fn. 10] (citations omitted).)

1 capacity.” Section 4660(c) provides in relevant part: “The administrative director shall amend the
2 schedule for the *determination of the percentage of permanent disability* in accordance with this
3 schedule at least once every five years” (emphasis added). “A permanent disability rating can
4 range from 0% to 100%. Zero percent signifies *no reduction in earning capacity*, while 100%
5 represents permanent total disability Permanent total disability represents a level of disability
6 at which an employee *has sustained a total loss of earning capacity*” (*Schedule for Rating*
7 *Permanent Disabilities* (January 2005), pages 1-2 – 1-3 (emphasis added)).

8 Thus, neither prior nor present section 4660 defines “permanent disability.”² Instead, they
9 set forth the criteria for the administrative director to use in preparing and amending permanent
10 disability rating schedules. Therefore, when the rating schedules are rebutted, it is all of section
11 4660 and the rating schedules that they create that are rebutted, not simply the “diminished ability
12 . . . to compete in an open labor market” or “diminished future earning capacity” clauses.

13 When our Supreme Court considered prior section 4660, it stated: “A permanent
14 disability rating should reflect as accurately as possible an injured employee’s diminished ability
15 to compete in the open labor market. The fact that a worker has been precluded from vocational
16 retraining is a significant factor to be taken into account in evaluating his or her potential
17 employability. A prior permanent disability rating and award which fails to reflect that fact is
18 inequitable” (*LeBoeuf v. Workers’ Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246 [48
19 Cal.Comp.Cases 587, 597]). The Court reached this conclusion despite the fact that prior section
20 4660 said nothing about vocational rehabilitation. Nor did the Court require the injured employee
21 to restate his permanent disability in terms of the schedule created by former section 4660, except
22 to the extent that the disability affected his ability to compete in an open labor market.

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25 ² “[P]ermanent disability is understood as “the irreversible residual of an injury”” (*Kopping v. Workers’*
26 *Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1111, quoting 1 Cal. Workers’ Compensation Practice
27 (Cont.Ed.Bar 4th ed. 2005) § 5.1, p. 276, italics omitted). “A permanent disability is one “... which causes
impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open
labor market.”” (*State Compensation Ins. Fund v. Industrial Acc. Com.* (1963) 59 Cal.2d 45, 52.) Thus, permanent
disability payments are intended to compensate workers for both physical loss and the loss of some or all of their
future earning capacity. (Lab. Code, § 4660, subd. (a); *Livitsanos v. Superior Court* (1993) 2 Cal.4th 744, 753”
(*Brodie*, 40 Cal.4th at p. 1320 [72 Cal.Comp.Cases at p. 571] (footnote omitted)).

1 Here, the majority does not dispute that applicant has proved that her actual diminished
2 future earning capacity is substantially disproportionate to her rating under the 2005 Schedule.
3 Because she has proved that, I believe that she has successfully rebutted the 2005 Schedule as to
4 herself. By doing so, applicant has also rebutted the language in section 4660 that creates that
5 schedule. The percentage of her actual loss of future earnings as demonstrated by both parties'
6 expert witnesses is the most accurate reflection of her diminished future earning capacity.
7 Therefore, her permanent disability rating should be the percentage of her lost future earning
8 capacity and not the rating produced by the labored and complicated formula proposed by the
9 majority.

10 The method that I propose is comprehensive, analytically sound, and operationally simple.
11 It would require vocational or other experts to estimate the injured employee's post-injury earning
12 capacity based upon medical opinions evaluating her permanent impairments and earning capacity
13 had she not suffered the industrial injury, both to be determined from the permanent and
14 stationary date through her projected years in the work force.³ Such expert testimony is common
15 in marriage dissolution cases,⁴ personal injury cases,⁵ and employment cases. Indeed, the
16 vocational experts in this case provided expert opinions that were remarkably consistent with each
17 other, a fact that indicates that their methodologies are well enough understood to provide reliable
18 evidence.

19 The majority fears that this exception to the 2005 Schedule will swallow the rule and this
20 result was not intended by the Legislature. But there is no reason to believe that parties would
21 attempt to rebut the schedule in every case. Indeed, the vast majority of cases decided between
22 *LeBoeuf* and SB899 were based upon the schedule then in use, not vocational rehabilitation
23 evidence, despite the fact that vocational rehabilitation evidence was authorized by the Supreme
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25 ³ Thus, in this case the fact that applicant has not returned to work after her injury was found not to preclude a
finding that she has residual earning capacity after her injury.

26 ⁴ See Family Code section 4331.

27 ⁵ See, e.g., *Bonner v. Workers' Comp. Appeals Bd.* (1990) 225 Cal.App.3d 1023, 1037 [55 Cal.Comp.Cases
470, 478-479]: "In a personal injury matter, compensatory damages ... include ... the value of ... loss or impairment
of future earning capacity."

1 Court. In any case, this objection is not a reason to fail to determine permanent disability
2 efficiently and fairly.

3 The majority also objects to my method on the basis of cost. “[I]f parties routinely use
4 dueling vocational experts, or even one agreed vocational expert, then the costs of administering
5 the workers’ compensation may well increase” (slp. opn., page 14). The majority believes that its
6 method does not require expert evidence. However, the plan may well require expert evidence to
7 determine what may be an “other appropriate period” if the three years following date of injury is
8 not appropriate; to estimate what applicant’s post-injury earnings should be where applicant has
9 received temporary disability indemnity or has not returned to work after the injury; to determine
10 who are “similarly situated employees” where LMID data does not correspond to applicant’s
11 occupation; and to provide evidence when a WCJ determines that the majority’s plan does not
12 apply. Furthermore, since each case will require two determinations by the WCJ (i.e., which
13 method should be applied, followed by whether the 2005 Schedule has been rebutted), the
14 majority’s plan requires increased litigation costs in each case. Whether this increased cost is
15 more or less than the cost of my method is impossible to determine at this time, but it cannot be
16 said that the majority’s plan is cost-free.

17 In place of the relatively simple method that I propose, the majority adopts a plan that is
18 complicated and limited. First, the applicant’s post-injury earnings in the three years following
19 his or her injury or some “other appropriate period” are determined. This figure is deducted from
20 what “similarly situated employees” earned during the same three-year or other period. The
21 parties are to look to collective bargaining agreement, if any, or EDD wage data to determine the
22 earnings of “similarly situated employees.” The difference between these two numbers is the
23 estimated earnings loss of the injured employee. Then, the estimated earnings loss is divided by
24 the average earnings of the “control group” to produce the “proportional earnings loss.” The
25 employee’s standard WPI rating under the AME Guides is then divided by the proportional
26 earnings loss. The result is called “individualized rating to loss” (IRL) ratio. If the IRL ratio is
27 the same as or within the range of ratios in Table B of the 2005 Schedule for the same

1 impairment, the Schedule is not rebutted. If the IRL ratio is less than or greater than the
2 scheduled ratios, the Schedule is rebutted. If the IRL ratio is within the range or ratios in Table A
3 of the Schedule, that ratio shall be used. If the IRL ratio is not within that range of ratios, the
4 DFEC adjustment factor shall be obtained by the formula $([1.81/a] \times .1) + 1$.

5 In addition to the obvious complexity of this plan, there are other problems.

6 The majority hold that an injured employee's post-injury earnings should be determined
7 for a period of three years from the *date of injury*, although "there is nothing magical about a
8 three-year period" (slp. opn., page 23). This three-year period is based on the 2003 and 2004
9 RAND Studies (see slp. opn., page 18, n. 12). However, for most injured employees who sustain
10 permanent disabilities, as for the applicant in this case, there is a period of temporary disability for
11 which the employee receives temporary disability indemnity. But temporary disability indemnity
12 is not earnings. "Temporary disability benefits are intended primarily to replace lost earnings"
13 (*Western Growers Insurance Company v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16
14 Cal.App.4th 227 [58 Cal.Comp.Cases 323, 327]). The measure of temporary disability indemnity
15 is *pre-injury* earnings, not *post-injury* earnings.⁶ So what is the significance of temporary
16 disability indemnity that an injured employee receives during the three years after the date of
17 injury? The majority does not explain.

18 A more significant problem with the majority's plan is that despite its complicated
19 machinery, it is designed to apply to only an undefined subset of cases in which a party may be
20 able to rebut the 2005 Schedule. The majority recognize this limitation (slp. opn., pages 33-35).
21 As to those exceptions, the majority give no guidance at all: "The question of whether the DFEC
22 rebuttal method discussed above should or should not be used in any particular case must be
23 determined on a case-by-case basis. Moreover, when the foregoing method is not appropriate, it
24 initially will be up to the assigned WCJ to decide what alternative method might be used" (slp.
25 opn., page 35).

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⁶ Labor Code section 4453.

1 So the majority’s plan is a two-step process. First, the WCJ determines whether the
2 majority’s method applies to the case. If the method does apply, the parties then attempt to obtain
3 the data required by the method and to apply the formula. If the method does not apply, the WCJ
4 must decide what method her or she will require in the case, and then the parties will attempt to
5 obtain the data required by the WCJ. Only then will the WCJ decide whether the schedule has
6 been rebutted. All of these determinations will be made on a case-by-case basis.

7 Thus, the majority presents a complicated plan that applies to only a subset of cases where
8 a party attempts to rebut the 2005 Schedule, and the majority does not determine what that subset
9 might be, leaving it for case-by-case determination. The California Constitution requires that “the
10 administration of [workers’ compensation] legislation shall accomplish substantial justice in all
11 cases expeditiously, inexpensively, and without incumbrance of any character” (Art. XIV, § 4).
12 The majority’s plan is neither expeditious nor inexpensive, and whether it accomplishes
13 substantial justice is difficult to determine.

14 In contrast, my method requires the same categories of data in every case, and it requires
15 expert evidence that is widely used in other kinds of cases. Because this method would be easily
16 understood, it would allow the parties to evaluate their cases and settle them, rather than requiring
17 trials in each case to determine the method that should be applied to determining whether the
18 2005 Schedule has been rebutted and then to determine whether the Schedule has in fact been
19 rebutted.

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2 For all of the foregoing reasons, I would adopt the method that I have outlined above, and
3 therefore I dissent.

4 */s/ Ronnie G. Caplane*
5 *RONNIE G. CAPLANE, Commissioner*

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7 ***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***

8 ***2/3/2009***

9 ***SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT
10 THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:***

11 ***Wanda Ogilvie
12 Office of the City Attorney
13 Law Office of Joseph C. Waxman***

14 ***MR/aml***
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